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THE
ONTARIO REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (THE COURT OF APPEAL FOR
ONTARIO AND THE HIGH COURT OF
JUSTICE FOR ONTARIO).

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JUDGES
OF THE
SUPREME COURT OF ONTARIO
DURING THE PERIOD OF THESE REPORTS.

THE COURT OF APPEAL FOR ONTARIO.

Chief Justice of Ontario.

The Honourable ROBERT SPELMAN ROBERTSON.

Justices of Appeal.

The Honourable WILLIAM RENWICK RIDDELL.
The Honourable ROBERT GRANT FISHER.
The Honourable WILLIAM THOMAS HENDERSON.
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The Honourable JOHN GORDON GILLANDERS.
The Honourable ROY LINDSAY KELLOCK.
The Honourable ROBERT EVERETT LAIDLAW.
The Honourable WILFRID DANIEL ROACH.
The Honourable JAMES CHALMERS MCRUER.

THE HIGH COURT OF JUSTICE FOR ONTARIO.

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The Honourable HUGH EDWARD ROSE.

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ATTORNEY-GENERAL FOR ONTARIO.

The Honourable LESLIE EGERTON BLACKWELL, K.C.

MEMORANDA.

The Honourable CHARLES PATRICK MCTAGUE, a Justice of Appeal, resigned his office on 20th April 1944.

The Honourable ROY LINDSAY KELLOCK, a Justice of Appeal, was appointed a judge of the Supreme Court of Canada on 3rd October 1944.

The Honourable WILFRID DANIEL ROACH, a Judge of the High Court of Justice, was appointed a Justice of Appeal on 6th October 1944.

The Honourable ARTHUR MAHONY LEBEL, one of His Majesty's counsel, was appointed a Judge of the High Court of Justice on 6th October 1944.

The Honourable JAMES CHALMERS MCGRUER, one of His Majesty's counsel, was appointed a Justice of Appeal on 14th October 1944.

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO 1944

[COURT OF APPEAL.]

The Montreal Trust Company v. The City of Toronto.

Taxation—Assessment—Effect of Sale Made before, but Not Completed until after, Preparation of Assessment Roll—Sale to Crown—The Assessment Act, R.S.O. 1937, c. 272, ss. 4(1), 36(11), 99—The British North America Act, s. 125.

Sale of Land—Position of Parties between Making of Contract and Completion of Sale—To What Extent Vendor a Trustee for Purchaser.

The appellant, the assessed owner of land in Toronto, sold it to the Crown. The agreement for sale was made before the completion and return of the assessment roll for 1943, but the sale was not completed, according to the terms of the agreement, until after the completion of the roll. The appellant now claimed that it should not be entered on the roll as owner, but should appear thereon, if at all, only as trustee for the Crown.

Held, this contention could not succeed. The appellant was the owner when the roll was completed, and was properly shown as such; but, the sale having now been completed, and the property having vested in the Crown, it would be exempt from taxes in 1944.

Per Robertson C.J.O. and Gillanders J.A.: The assessor, in preparing his roll, is not required to inform himself of all the equities that may exist. Difficult questions arise in the determination of such questions, and The Assessment Act does not contemplate the assessment of equitable interests, such as that here in question. In the case of a sale to a private purchaser, the situation is provided for by s. 99 of the Act. Reported decisions under The Consolidated Assessment Act of Upper Canada, C.S.U.C. 1859, c. 55, can now be applied only with due regard to the intervening changes in the law.

Per Kellock J.A.: Although it is commonly stated that the vendor, under an uncompleted agreement for the sale of land, is a trustee for the purchaser, this statement must be qualified by what is said in *Howard v. Miller et al.*, [1915] A.C. 318. It is only to the extent that the agreement will be specifically enforced by the Court that a trusteeship exists, and an assessor is obviously not qualified to decide how far an agreement is enforceable; for him to do so would be a usurpation of the function of the courts, and even the courts could not decide such a question in the absence of one of the parties to the agreement, *viz.*, the purchaser. A vendor in such circumstances is therefore not such a trustee as is contemplated by s. 36(11) of The Assessment Act.

AN appeal by way of stated case from the decision of Macdonell Co. Ct. J., dismissing an appeal from the decision of a

Court of Revision, which confirmed an assessment. The stated case was as follows:

27th October 1943. MACDONELL Co. Ct. J.:—This is an appeal by The Montreal Trust Company from the decision of the Court of Revision of the City of Toronto, assessing "Montreal Trust Company, Trustee" as owner of the Johnston building, situate at the corner of York and Front Streets, for \$152,750.

On 21st January 1943, the appellant offered to sell the property to the Dominion Government. This offer was accepted on 25th January 1943. Pursuant to the agreement of sale thus constituted, the transaction was closed on 30th April 1943. The agreement provided that the tenants should receive notices requiring them to vacate their premises in periods of not less than the maximum period required by the terms of their respective leases, the laws of the Province of Ontario, and Order no. 108 of The Wartime Prices and Trade Board. Taxes, local improvement rates, rents, water rates, costs of coal and other expendable supplies, were to be apportioned as of the date of closing. It also provided that the Crown would pay the taxes and local improvement rates from the date of closing to 31st December 1943. There was further provision for possession by the Crown upon vacation by the tenants.

On 21st April 1943, the solicitors for the appellant by letter informed the Assessment Commissioner of the particulars of the sale, and contended that the appellant after 30th April would no longer be the owner of the property, and should not continue to be so assessed. It is admitted that this letter was received by the Assessment Commissioner on 22nd April. On 22nd April the assessor returned the assessment roll made in 1943, upon which taxes for 1944 would be levied. The assessor on investigation had found the appellant in possession of the property, with numerous tenants who were assessed for business assessment. The roll was entered accordingly. In his reply to the solicitors' letter, dated 7th May, the Assessment Commissioner said that this was a matter that should be dealt with on appeal, and that he had entered a regular appeal on behalf of The Montreal Trust Company to the Court of Revision. The Court of Revision confirmed the assessments made.

DECISION.

The appeal was heard by me on 1st October 1943. I reserved my decision and asked counsel to assist me by submitting memoranda as to any authorities, which they did. On 22nd October 1943, I dismissed the appeal.

REASONS FOR MY DECISION.

There is only one point to be decided, and that is whether the appellant was or was not "owner" of the assessed premises, within the meaning of that term as used in The Assessment Act, on 22nd April 1943, the date of the return of the roll by the assessor. It is clear that unless the ownership has changed there is no power in the Court of Revision or this Court to alter the roll (see *Re Williams and Regimbal*, [1935] O.R. 199, [1935] 2 D.L.R. 283). The assessment takes place for the first time when the completed roll is delivered by the assessor to the clerk, and the intention of the statute is that the roll so delivered shall conform to the situation and facts as they exist at the time of delivery of the roll to the clerk. (See *Re Bayack*, 64 O.L.R. 14 at 22, [1929] 3 D.L.R. 480).

Unfortunately, the term "owner" is not defined in The Assessment Act, R.S.O. 1937, c. 272, The Interpretation Act, R.S.O. 1937, c. 1, or The Municipal Act, R.S.O. 1937, c. 266. S. 36(1) of The Assessment Act reads:

"Land occupied by the owner shall be assessed against him". The section then proceeds to deal with the particular problems of unoccupied land or non-resident owners, etc.

The most helpful authority as to the meaning of "owner" for the purposes of this case is found in the judgment of the late Chancellor Boyd, in *Sawers v. The City of Toronto* (1901), 2 O.L.R. 717 at 719:

"There is no definition given of the word [owner] and it is notoriously one of very flexible meaning, taking its colouring very much from the context or the intention of the parties (where there are mutual dealings)."

In that case it was held that a purchaser who had gone into possession and made part payment of the purchase money under an agreement for sale of land, which provided for payment by the purchaser of the taxes, etc., from the date of the agreement, was an "owner" within the provisions of The Assessment Act. It should be noted, however, that there the purchaser was in

possession, entitled to the proceeds of the property, and was by agreement the party liable to pay the taxes; quite different from the facts here.

Counsel for the appellant contended that from and after the acceptance of the offer, the purchaser was the owner of the property, and the proper party to be assessed, and cited the well-known equitable rule that an agreement for the sale of land, of which specific performance can be ordered, operates as an alienation by the vendor of his beneficial proprietary interest in the property, and from the date of the contract the property in equity belongs to the purchaser. The rule is clearly stated in the judgment of Cairns L.J. in the case of *Shaw v. Foster et al.* (1872), L.R. 5 H.L. 321 at p. 338, as follows:

"Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of Equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property." Particular attention must be given to the words immediately following "not a mere dormant trustee". I think this is the gist of the whole matter. 29 Halsbury, 2nd ed., p. 338 reads:

"But the vendor is not a mere trustee. Until payment he retains a personal and substantial interest in the property, a right to protect that interest, and an active right to assert it if anything in derogation of it should be done, and the relation of trustee and *cestui que trust* is subject to the paramount right of the trustee to protect his own interest as vendor of the property. [*Shaw v. Foster et al.* (1872), L.R. 5 H.L. 321 at 338. *Allen v. Commissioners of Inland Revenue*, [1913] 1 K.B. 327 at 334.] There is, in fact, only a qualified trusteeship until the price is paid and nothing remains to be done by either party ex-

cept the execution of the deed of conveyance. [*Rayner v. Preston* (1881), 18 Ch. D. 1, at 13].”

We are all familiar with the rigid rules of the common law surrounding the ownership of land, which after the Norman conquest was virtually the only property in England of any value. We are also familiar with the manner in which these rules had to be relaxed by the principles of equity administered by a different court, but I think it may safely be said that with the combination of the courts and the development of modern conditions, these rules, although frequently a guide, sometimes become of more academic than practical interest. The rules of equity deal with the rights of the parties *inter se*; what must be decided here is who is in fact the “owner” for the purposes of the municipality.

Here it must be noted that there is no doubt that at the time of the return of the assessment roll the rents and benefits from the property went to the vendor, who was entitled to possession, and they so went until 30th April, and it was not until that date that the purchaser became liable to pay the taxes.

Further assistance is obtained from the definition of “owner” in Stroud’s Judicial Dictionary, 2nd ed., vol. II, p. 1387:

“The ‘owner’ or ‘proprietor’ of a property is the person in whom . . . it is for the time being beneficially vested, and who has the occupation, or control, or usufruct, of it: e.g. a lessee is, during the term, the owner of the property demised”.

Who, then, was the virtual “owner” on 22nd April, and the proper party to be assessed for taxation? I would unhesitatingly say the vendor.

The practical effect upon the city administration of any course other than that followed by the officials in this case would be upsetting, to say the least. We all know that in practice many offers to purchase are accepted pursuant to which sales are never closed. If, to protect themselves, the city officials were put upon enquiry and were forced to alter the assessment roll into the name of the purchaser, chaos might well result.

A secondary argument of the appellant was that in any event after the date of the agreement for sale the vendor should be assessed as trustee for the purchaser, in this case the Crown, and therefore the land is not liable to taxation. S. 38 of The Assessment Act deals with land in which the Crown has an interest. Under its provisions taxes are not payable by the

Crown; only by any other parties interested in the property. It is clear, however, that the appeal before me relates only to the proper wording of the assessment roll. Even giving weight to this contention of the appellant, the assessment roll, reading as it does "Montreal Trust Company, Trustee" is correct; whether or not any taxes are payable by the appellant is a matter which is not before the Court at this time.

QUESTION.

Upon the facts above stated and upon a true construction of The Assessment Act, particularly ss. 36 and 38 thereof as applied to such facts, was I right in holding that on 22nd April 1943 the appellant was the "owner" of the said Johnston Building within the meaning of the said sections and that the appellant was properly assessed as such on the assessment roll for the year 1943 upon which taxes for the year 1944 will be levied?

22nd November 1943. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and KELLOCK JJ.A.

H. C. Walker, K.C., for the appellant: The point to be decided is whether the appellant was or was not "owner" of the assessed premises within the meaning of that term as used in The Assessment Act, R.S.O. 1937, c. 272, on 22nd April 1943, the date of the return of the assessment roll. It is our fear that in 1944, after we have been out of the premises for eight months, we may be faced with a tax based upon the 1943 roll. [ROBERTSON C.J.O.: The property undoubtedly belongs to the Crown. How can the city impose a tax when s. 125 of The British North America Act specifically provides that Crown property is not taxable. This overrides The Assessment Act.] We asked for an assurance that the tax would not be levied, and did not receive it. The assessment roll is wrong and should be corrected; that is the point of the appeal. It is a tax on the land, but it was artificially on the land at the time the roll was closed. [ROBERTSON C.J.O.: It is not the owner who is liable to be taxed, but the land. If your argument is right in the present instance, the principle would be applicable in the case of a private individual. Untold confusion would result if the name were changed on the roll before the transaction was completed. Many sales do not go through.] The purchaser becomes the beneficial owner of the property on the making of a binding contract of sale. [ROBERTSON C.J.O.: The assessment roll does

not take into consideration equitable rights.] It would seem that it is the beneficial owner who is mentioned throughout the sections of The Assessment Act. If the meaning of "owner" is the beneficial owner, then we are entitled to the relief for which we are asking. [ROBERTSON C.J.O.: That is not an accurate way of putting the matter. The vendor has the legal estate, and will not part with it until he has the purchase price. Consider the case of a trustee who held property for people for life and then in remainder. What about s. 36(11) of The Assessment Act?] Here, the appellant is in a dual capacity: as trustee for the Bank of Commerce, and after the offer to purchase has been accepted, as trustee for the purchaser. [ROBERTSON C.J.O.: The Assessment Act is not intended to operate that way.] The assessment roll cannot be correct if it is subject to two constructions; it should be corrected in order to avoid further proceedings. The crucial time is that at which the roll is closed. [ROBERTSON C.J.O.: To yield to your argument would cause much difficulty. To leave the roll alone will make no trouble.] The vendor is in possession by virtue of a contract. [ROBERTSON C.J.O.: He was there because he owned the land.] Once there is a binding contract in existence, he is no longer the beneficial owner. [KELLOCK J.A.: What is the difference between this and *City of Ottawa v. Wilson*, [1933] O.R. 21, [1933] 1 D.L.R. 273? The defendant there was no longer a person who could be taxed; is that not your situation?] [GILLANDERS J.A.: I do not think your name on the roll imposes any liability on you.] S. 38 of The Assessment Act is a difficult obstacle. We were the occupant up until the date for closing the roll. [KELLOCK J.A.: S. 315 of The Municipal Act, R.S.O. 1937, c. 266, might be an additional problem.] [ROBERTSON C.J.O.: This is not rateable property when it belongs to the Crown.]

J. Palmer Kent, K.C., for the respondent, was not called upon.

At the conclusion of the argument, THE COURT delivered judgment orally, dismissing the appeal. The following written reasons were subsequently delivered:

26th November 1943. ROBERTSON C.J.O.: This is an assessment appeal by way of stated case under s. 85 of The Assessment Act, R.S.O. 1937, c. 272, from the decision of Judge Macdonell, of the County Court of the County of York.

A property on the north-west corner of York and Front Streets, in Toronto, was vested in the appellant. On the 25th January 1943, appellant entered into an agreement for the sale of this land to the Crown, the date for completion of the sale being fixed as 30th April 1943, the appellant and its tenants in the meantime remaining in possession. The assessor completed his assessment roll for this section of the city, and returned it to the City Clerk on 22nd April. This is the roll upon which the tax rate for the year 1944 will be based. The appellant is assessed as owner. No information had been conveyed to the assessor, or to the Assessment Commissioner, with respect to the agreement for sale of the property to the Crown, until the receipt of a letter by the Assessment Commissioner, on 22nd April, the day that the assessor returned his roll. This letter informed the Assessment Commissioner of the agreement for sale, and that conveyance was to be made on 30th April.

The appellant asks that its name should be removed from the roll as the owner, or, in the alternative, that it should be noted on the roll that it is trustee for the Crown. The contention of the appellant is that immediately on the making of the agreement for sale, the appellant ceased to be the beneficial owner of the property, and that ownership in equity became vested in the Crown, the appellant having merely the right to the purchase money. The appellant is apprehensive that, when the rate by-law comes to be passed for levying taxes in 1944, it will be held liable for the taxes upon these lands, as the assessed owner.

In our opinion, the appellant properly appeared upon the assessment roll as the owner on 22nd April 1943, when the roll was returned. The assessor had found appellant in occupation either itself or by its tenants. We are also of the opinion that, the sale having now been completed and the lands vested in the Crown, no taxes can validly be levied upon them in 1944. Not only is the interest of the Crown in any property expressly excepted from the real property in Ontario liable to taxation, by The Assessment Act itself (R.S.O. 1937, c. 272, s. 4, subs. 1), but by s. 125 of The British North America Act no lands or property belonging to Canada or any Province shall be liable to taxation.

We do not think that it is required by The Assessment Act that assessors should inform themselves, in the preparation of

their rolls, of all the equities that may exist in respect of lands that they are to assess. Many difficult questions arise in respect of such matters, and the assessor has no means of ascertaining the facts, nor can it be assumed that he would be equipped with the necessary knowledge of the law to apply it to the facts, if he knew them. The Assessment Act does not contemplate the assessment of equitable interests, such as that in question here, in any event while the legal estate remains vested in the person in possession or occupation as owner.

In the ordinary case of a sale to a private purchaser, no difficulty is created by assessing the vendor who has not conveyed. S. 99 of The Assessment Act makes the subsequent owner liable to the municipality, and the vendor himself is protected by his agreement, according to its terms. On the other hand, if the purchaser in such a case were assessed and the vendor's name were omitted from the assessment roll, an undesirable situation would exist if the agreement for sale were not carried out, as happens not infrequently.

Reported decisions in cases that arose under The Consolidated Assessment Act of Upper Canada, C.S.U.C. 1859, c. 55, are to be applied now only with due regard to changes in the assessment law. Under s. 10 of the older statute, in cities, towns and villages the rates were calculated at so much in the dollar upon the yearly value of the property liable to assessment, and not upon the actual value of the land itself. The assessor in a city, town or village was required, by the old statute, to show on his assessment roll, the rental of each separate parcel of real property, and when the rental was not assessed, the yearly value of each separate parcel (s. 19, subs. 4).

It is further to be observed that in cases such as *Shaw v. Shaw* (1862), 12 U.C.C.P. 456, and *The Principal Secretary of State for War v. The Corporation of the City of Toronto* (1863), 22 U.C.Q.B. 551, cases which still are cited, the Crown had only a leasehold interest, and that interest only was exempt. In the present case the Crown is now the sole owner, and the lands are, therefore, wholly exempt from taxation.

In our opinion, the County Judge was right in deciding as he did. The respondent is entitled to its costs of the appeal.

GILLANDERS J.A. agrees with ROBERTSON C.J.O.

KELLOCK J.A.:—The facts sufficiently appear in the judgment of my Lord, and I shall not repeat them.

The appellant contends that the roll should have been amended by the assessor, and should now be amended, by entering thereon the fact that the appellant is a trustee for the Crown, and the appellant refers to s. 36(11) of The Assessment Act, R.S.O. 1937, c. 272. It is, therefore, important to ascertain if, and to what extent, the word "trustee" as used in the section aptly described the appellant on 22nd April 1943, in so far as its relation to the Crown by virtue of the contract of sale then subsisting is concerned. On that date, while the appellant had agreed to sell the lands to the Crown, the contract had not been completed, and the appellant was still in possession and in receipt of the rents and profits for its own benefit.

The argument on behalf of the appellant is that the relationship of vendor and purchaser under an agreement of sale, of which specific performance will be ordered by the Court, is that of trustee and *cestui que trust*, and that such was the relationship between the appellant and the Crown on the date in question. *Holroyd et al. v. Marshall et al.* (1862), 10 H.L. Cas. 191, 11 E.R. 999; *Shaw v. Foster et al.* (1872), L.R. 5 H.L. 321, and *Lysaght v. Edwards* (1876), 2 Ch. D. 499, are cited in support. The principle established by these cases is to be taken subject to what is said by Lord Parker of Waddington in *Howard v. Miller et al.*, [1915] A.C. 318, at 326, 20 B.C.R. 227, 22 D.L.R. 75, 7 W.W.R. 627, 30 W.L.R. 112.

"It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase-money; but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract.

"The interest conferred by the agreement in question was an interest commensurate with the relief which equity would give by way of specific performance, and if the plaintiff Miller had in his application attempted to define the nature of his interest, he could only so define it. Further, if the registrar had, as in their Lordships' opinion he ought to have done, specified on the register the nature of the interest which he registered as a charge, he could only have so specified it. Had he attempted

further to define the interest, had he, for example, stated it as an equitable fee subject to the payment of the purchase-money, he would have been usurping the function of the Court, and affecting to decide how far the contract ought to be specifically performed."

Could the assessor in the case at bar, any more than the registrar in the case with which Lord Parker was dealing, have decided the question as to whether or not the contract between the appellant and the Crown should be specifically performed? In my opinion, for the assessor so to do would be to usurp the function of the Court, as in the opinion of Lord Parker the registrar would have been usurping that function in the case put in the judgment referred to. I do not think that the assessor, the Court of Revision, the County Judge, or this Court, could determine such a question in the circumstances here present, and, certainly, it could not be determined in the absence of one of the parties to the contract, namely, the purchaser.

In my opinion, the reason which prompted the decision in *In re Colling* (1886), 32 Ch. D. 333, under the legislation there in question, applies with equal force under the legislation in question here, the reason being that in the case of any contract for the purchase and sale of property "there might always be a question whether the contract could be enforced by a suit for specific performance; and it would be extremely inconvenient to declare the vendor to be a trustee upon a petition on which that point could not be decided." The point cannot be decided because one of the parties to the contract is absent.

In *Central Trust and Safe Deposit Company v. Snider et al.*, [1916] 1 A.C. 266, 35 O.L.R. 246, 25 D.L.R. 410, (a case originating in Ontario) the following passage occurs in the judgment of Lord Parker (p. 272):

"It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser. . . . But it must not be forgotten that in each case it is tacitly assumed that the contract would in a Court of Equity be enforced specifically.

"If for some reason equity would not enforce specific performance, or if the right to specific performance has been lost by the subsequent conduct of the party in whose favour specific performance might originally have been granted, the vendor . . . either never was, or has ceased to be, a trustee in any sense at all. Their Lordships had to consider this point in the

case of *Howard v. Miller* [*supra*] in connection with the law as to the registration of titles in the province of British Columbia, and came to the conclusion that, though the purchaser of real estate might before conveyance have an equitable interest capable of registration, such interest was in every case commensurate only with what would be decreed to him by a Court of Equity in specifically performing the contract, and could only be defined by reference to the relief which the Court would give by way of specific performance."

There are other expressions in the cases which might be mentioned. *Ridout v. Fowler*, [1904] 1 Ch. 658, affirmed [1904] 2 Ch. 93, is a case in which the purchaser under an agreement of sale had gone into possession but had subsequently, in an action brought against him for specific performance, consented to a decree rescinding the contract. Farwell J., in the course of his judgment in [1904] 1 Ch. at 662, said:—

"Now here it is quite clear that the relationship of trustee and cestui que trust never was created by the completion of the contract, and therefore there never was any estate in land in the events that have happened on which this order by way of equitable execution could have operated." He was speaking of an order obtained by an execution creditor of the purchaser prior to the rescission of the contract, under which order the creditor had been appointed receiver to receive the rents, profits, and moneys receivable by the purchaser in respect of his interest in the premises subject to the agreement for sale. The learned judge proceeds:—

"That disposes of the question of any charge upon the real estate, because by reason of the events that have happened, and which the plaintiff in the present action could not interfere with or prevent, no actual estate in the land ever belonged to the debtor [that is, the purchaser] at all."

In *Robinson v. Moffatt* (1916), 37 O.L.R. 52, 31 D.L.R. 490. Meredith C.J.C.P. says, at p. 55:—

"Both at law and in equity, the vendor is the owner of the land in the sense of having the lawful title to it; the purchaser has only an equitable right to it; but, to that extent, if the agreement be carried out, is treated in equity as substantially the owner, the real owner, or formal owner, if you choose to call him such, though that would not be strictly accurate; the vendor is a trustee for the purchaser, but bound to convey to him only

on fulfilment by the purchaser of all things agreed to be done, on his part, before getting the conveyance. An agreement may never be carried into effect, it may end in nothing by various ways, and it may be that Equity, however measured, may refuse specific performance, and so the vendor may remain owner, unaffected by the agreement, without the aid of any Court. But, whether he does or not, he is still owner and can convey his ownership, subject of course to any equitable right which the purchaser may have; he has none at law except a personal action against the vendor if he should refuse or be unable to carry out his contract."

This statement of the law was expressly approved by Hodgins J.A., reading the judgment of the Court in *Kimniak v. Anderson*, 63 O.L.R. 428 at 432, [1929] 2 D.L.R. 904. The learned judge reviews many of the authorities to which I have already referred, and holds that the interest of a purchaser under an agreement for sale is not such an interest as comes within the rather wide terms of s. 34 of The Execution Act, R.S.O. 1927, c. 112, now R.S.O. 1937, c. 125. At page 436 of the judgment, the following occurs:—

"In view of the fact that the interest of a purchaser under a contract for the purchase of real estate is expressly subject to what a Court of Equity thinks and decrees that it ought to be, the nature and extent of which cannot be predicated, and that it is also always liable before the Court is seized of it to be lost or to vanish in cases of default, I am of opinion that the interest of such a purchaser is not properly saleable under a writ of *fieri facias*, but can only be reached, if it can be reached at all, by way of equitable execution where the Court can protect all parties and exercise or anticipate the rights which would flow from a contract if recognised in Equity as not merely one capable of specific performance but in fact entitled to be so enforced."

In *Rayner v. Preston* (1881), 18 Ch. D. 1, James L.J., at p. 13, says:—

"I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the con-

tract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust*."

I refer also to *The King v. Caledonian Insurance Company*, [1924] S.C.R. 207 at 213, [1924] 2 D.L.R. 649, and to the judgment of Cozens-Hardy J., as he then was, in *Cornwall v. Henson*, [1899] 2 Ch. 710 at 714. The judgment was reversed in [1900] 2 Ch. 298, on another ground. I also refer to Dart on Vendors and Purchasers, 8th ed., p. 266.

These authorities, in my opinion, establish that the appellant in the circumstances here present was not entitled to be entered on the roll on 22nd April 1943 as trustee for the Crown. If in any case a purchaser in the position of the Crown in the case at bar were to be entered on the roll as soon as the agreement for sale was entered into, and for any reason the sale were not completed, perhaps owing to want of title, or some default on the part of the vendor, the purchaser would then find himself liable for the taxes on the property by reason of s. 99 of The Assessment Act. Further, if the vendor were left off the roll the municipality might be unable to recover the taxes from him, as he would not be a "subsequent" owner as required by s. 99. I do not think either of these results is intended by The Assessment Act.

In the present case, the fact that the sale was completed subsequent to 22nd April does not affect the point arising here for decision: *Re Williams and Regimbal*, [1935] O.R. 199, [1935] 2 D.L.R. 283.

I think there is another reason why a person in the position of the appellant is not such a trustee as is envisaged by s. 36(1). A trustee, such as is contemplated by the subsection, when as-

sessed as trustee, would be obliged to retain sufficient assets of the trust estate in his hands to satisfy the taxes to be levied upon the roll upon which his name appears. In the case of a vendor under an agreement for sale, however, the vendor would have no such right, as he would be obliged to convey the legal estate to the purchaser in accordance with the terms of the contract of sale, and would have no right to retain anything in his hands to satisfy the taxes. In my opinion, this clearly differentiates the position of the appellant under the sale agreement in question from that of a trustee contemplated by the subsection.

The assessment roll here in question is the roll on which taxes for the year 1944 will be levied. In my opinion, although the name of the appellant will appear on that roll at the time when the rate is struck in 1944, the appellant will not be liable for any taxes in respect of the lands in question as it apparently fears. The sale having now been completed, and the property vested in the Crown, it is exempt from taxation by virtue of s. 125 of The British North America Act, and if anything more be required, by virtue of s. 4(1) of The Assessment Act itself. While s. 315(1) of The Municipal Act, R.S.O. 1937, c. 266, authorizes a council to levy on "the whole rateable property according to the last revised assessment roll", "rateable" in this section means "rateable by law": *City of Ottawa v. Wilson*, [1933] O.R. 21 at 27, [1933] 1 D.L.R. 273. No taxes are leivable by law upon these lands, now the property of the Crown, regardless of the fact that they appear upon the assessment roll.

I agree, therefore, that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Blake, Anglin, Osler & Cassels, Toronto.

Solicitor for the respondent: J. Palmer Kent, Toronto.

[COURT OF APPEAL.]

Decker v. Bracebridge Garage.

Negligence—Dangerous Premises—Duty of Occupier towards Invitees and Licensees — Concealed Danger — Knowledge of Occupier — Whether Plaintiff reasonably Observant.

The plaintiff, desiring to leave a bottle at the defendant's garage (which he had been in the habit of doing, at infrequent intervals, for some years), asked R., the owner, where he might put it. R. indicated a place, but the plaintiff, instead of placing his bottle there, went behind the counter and down a passageway, looking for a place on a shelf. In an alcove or "bay" opening off the back of this passageway, he fell through a trap-door in the floor which had been left open by one of the defendant's employees.

Held, affirming the judgment of Chevrier J., the plaintiff could not recover. He was, at the time and place of the accident, a mere licensee, and the defendant had not been guilty of a breach of any duty owed to the plaintiff in the circumstances. R. had given instructions that the door was not to be left open, and he clearly did not know that it was open on this occasion. As to the employee who actually left it open, there was no evidence that he knew of the plaintiff's presence, or even knew that the plaintiff had a right to go into the passageway.

AN appeal by the plaintiff from the judgment of Chevrier J., after a trial without a jury, dismissing the action. The facts sufficiently appear from the reasons now reported.

15th and 16th November 1943. The appeal was heard by ROBERTSON C.J.O. and FISHER and GILLANDERS JJ.A.

F. J. Hughes, K.C., for the plaintiff, appellant: The plaintiff was an invitee, or at least a licensee with an interest, which would give him the same status as an invitee: *Denny v. The Montreal Telegraph Co.* (1879), 3 O.A.R. 628 at 629; *Keech v. Town of Smith's Falls* (1907), 15 O.L.R. 300 at 301; *Kimber v. Gas Light and Coke Company*, [1918] 1 K.B. 439; *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74 at 86; *Sutcliffe v. Clients Investment Company, Limited*, [1924] 2 K.B. 746; *Knowlton v. Hydro-Electric Power Commission of Ontario*, 58 O.L.R. 80 at 89, [1926] 1 D.L.R. 217, 32 C.R.C. 362. The trial judge has found him a bare licensee, but in the cases cited, in circumstances comparable to those of this case, the parties were considered to be more than licensees: *Gillingham v. Shiffer-Hillman Clothing Manufacturing Co. et al.*, [1933] O.R. 543, [1933] 3 D.L.R. 134, affirmed *sub nom. Greisman v. Gillingham et al.*, [1934] S.C.R. 375, [1934] 3 D.L.R. 472.

Even if the appellant was a bare licensee, the respondent is liable to him for the injuries sustained, as the trap-door was left open, contrary to instructions, by one of the respondent's own

servants. This was a concealed danger of which the appellant was unaware and the respondent had knowledge: Salmond on Torts, 9th ed., p. 518.

On the second branch of the case, dealing with the question of damages, those suggested by the trial judge are grossly inadequate. The appellant has suffered severely; the effects of this accident will remain with him for the rest of his life. Eminent medical men have given their opinions that he will never lose this pain and must govern his life accordingly. He has suffered a permanent disability for which he should be properly compensated.

T. N. Phelan, K.C., for the defendant, respondent. The trial judge rightly rejected the evidence of the appellant. There were conflicts between his evidence on discovery and that which he gave at the trial. The cases cited by counsel for the appellant deal with places to which the public normally has access. The passageway presently under discussion was not a public one. A licensee is only what the name implies, and here the licence was limited: *Connor v. Cornell* (1925), 57 O.L.R. 35. Furthermore, a man who enters premises as an invitee may change his category while there: *Knight v. Grand Trunk Pacific Development Co.*, [1926] S.C.R. 674 at 675, [1927] 1 D.L.R. 498; *Walsh v. International Bridge and Terminal Co.* (1918), 44 O.L.R. 117, 45 D.L.R. 701; *Azzole v. W. H. Yates Construction Co. Ltd.*, 61 O.L.R. 416 at 420, 421, [1928] 1 D.L.R. 233. Other authorities in support of the trial judge's decision are the following: *Lee v. Luper*, [1936] 3 All E.R. 817; *Walker et al. v. Midland Railway Company* (1886), 55 L.T. 489; *Clinton v. J. Lyons Company, Limited*, [1912] 3 K.B. 198 at 209. A review of several cases is to be found in *Taylor v. People's Loan and Savings Corporation*, 63 O.L.R. 202, [1929] 1 D.L.R. 160. The respondent cannot be expected to regulate his business solely with the consideration of the appellant's safety. This man was a very occasional licensee; he was not expected at any particular time. What is the duty of a proprietor under such conditions? Some help may be derived from a statement in the unreported case of *Saunders v. Kaplan*, in which the Court of Appeal affirmed the decision of Chevrier J. on 20th June 1941.

This accident occurred as a result of the plaintiff's own negligence. The trial judge so found and this was justified in the light of the evidence. The assessment of damages was a fair

one, since there was no loss of earnings. There has been nothing submitted in argument which would warrant interference with the trial judge's findings. We are prepared to treat this man as a licensee, but with a definite limitation on his licence to use this passageway.

F. J. Hughes, K.C., in reply, referred to *Keech v. Town of Smith's Falls* (1907), 15 O.L.R. 300; *Scriver v. Lowe et al.* (1900), 32 O.R. 290; *Lennie v. The Township of Etobicoke*, [1943] O.W.N. 622 at 623; *Letang v. Ottawa Electric Railway Company*, [1926] A.C. 725 at 729.

Cur. adv. vult.

13th December 1943. ROBERTSON C.J.O.:—This is an appeal from the judgment of Chevrier J., dated 27th May 1943, after the trial of the action before him without a jury, at Toronto. The action was dismissed, with costs, and the plaintiff now appeals. The action is for damages for injuries sustained by the appellant as the result of a fall through an open trap-door in the floor of the respondent's garage, on 1st August 1941.

It is unnecessary for me to set forth the story of this accident. I think the following findings should be made on the evidence:—

1. The appellant was not either an invitee or a trespasser, but he was a licensee at the place in the garage where the accident happened, at the time it happened.

2. The licence arose from the use by appellant on numerous occasions of the passage behind the counter, for the same purpose as on this occasion, and with respondent's knowledge and permission. The licence was not revoked nor limited by anything said or done by respondent on the day of the accident.

3. The trap-door, while standing open, was a concealed danger, added to any risks with which appellant's use of the passage had been attended theretofore, or of which he knew.

4. The accident was not caused, nor contributed to, by negligence on the part of appellant.

5. The respondent did not know, nor ought he to have known, that the trap-door was open at the time of the accident. He had instructed his employees that it was not to be left open.

6. There is no evidence that respondent's employee who left the trap-door open knew, or ought to have known, of appellant's presence on the premises, nor is there any evidence that he knew, or ought to have known, that appellant or anyone, other than

the owner and his employees, ever used, or had a right or licence to use, the passage behind the counter.

A brief statement in regard to some of these findings of fact is necessary. The first, I take to be expressly found by the learned trial judge, and to be supported by the evidence. The trial judge did not expressly make the second finding, but, logically, if the first finding is right, this also is right. I state it more particularly because of a contention pressed upon the argument of the appeal, based upon what took place between appellant and the owner, Rosewarne, on the occasion in question, immediately before appellant proceeded into the passage to put away his water bottle. In my opinion, it cannot reasonably be found that what then occurred amounted to a revocation of the licence already existing, and it certainly was not so understood by appellant.

As to the third finding, it is necessary to state the facts briefly. The trap-door was not in the passage itself. If it had been, the appellant would have had a fair chance of seeing it as he came along the passage towards it. The trap-door was in the fourth alcove opening off the passage, and within an inch or two of the passage. There are shelves in all the alcoves at a right angle to the passage, and to support these shelves at the end next the passage there is an upright board or plank from the floor to well up towards the ceiling. This obstructs the view into an alcove of anyone walking along the passage, until he is almost opposite the entrance to that alcove. By the same means the light is, to some extent, shut out from the alcoves, so that they have less light than the passage. The first-mentioned may well be the chief factor in concealing the floor of the alcove from one approaching it along the passage. The close proximity of the trap-door to the passage makes it, when open, a real danger to one using the passage. The slightest step towards the right on coming to the alcove would result in a fall. The danger is similar to the danger created by an unguarded excavation contiguous to a public highway, which has often been held to constitute a nuisance.

As to the fourth finding, with respect, I disagree with the learned trial judge, who found that appellant was negligent. If this were the case of an invitee, I cannot conceive that he would fail to recover damages, and yet an invitee is required to use reasonable care for his own safety. His own negligence may

deprive him of any remedy. On the basis that appellant was a licensee in proceeding as far along the passage as the fourth alcove—and that I understand to be the finding of the learned trial judge, with which I agree—I am unable to see wherein he can be said to have been negligent. The place was not new to him. He must have seen into all the alcoves many times, for they are quite open to the view of anyone from the front side of the counter. The practice being to keep the trap-door shut, he had no reason to suspect the possibility of a trap-door. At the time of the accident he was looking for a place on one of the shelves where it would be convenient to deposit the small bottle he was leaving at the garage. It seems to me the most natural thing in the world that, as he came opposite an alcove, he should cast a glance along its shelves to see if there was a vacant place there. Nothing in his previous experience of the place—and it had been considerable—would indicate to him that he had better keep his eyes on the floor.

In my opinion, this case is determined by the answer to the question, "What duty did the defendant owe to this plaintiff?" That answer is to be found in the answer to the question propounded, as the real issue, by the learned trial judge at the commencement of his reasons for judgment: "Was the plaintiff an invitee or a licensee when he fell through an open cellar trap-door on the defendant's premises?" I have already stated my agreement with the learned trial judge that appellant was a licensee and not an invitee. The distinction in the duty resting upon the occupier of premises towards persons who come upon the premises within these respective classes, is defined in many cases. A concise statement of it is given by the Lord Chancellor (Lord Hailsham) in *Robert Addie and Sons (Collieries), Limited v. Dumbreck*, [1929] A.C. 358 at p. 364, as follows:—"The highest duty exists towards those persons who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe. In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the

occupier." In *Gautret v. Egerton et al.; Jones v. Egerton et al.* (1867), L.R. 2 C.P. 371, Willes J. likened the permission given to a licensee to a gift, as to which the general principle is that the giver is not answerable for any injury from such a gift unless he knows at the time the dangerous character of the thing given. The principle of *Gautret v. Egerton* has been approved in many later cases, as, for example, *Nightingale v. The Union Colliery Company of British Columbia* (1904), 35 S.C.R. 65. Farwell L.J. in *Latham v. R. Johnson & Nephew, Limited*, [1913] 1 K.B. 398, at p. 404, citing *Indermaur v. Dames* (1866), L.R. 1 C.P. 274, says, "Any complaint by the licensee may be said to wear the colour of ingratitude so long as there is no design to injure him."

In the present case there is no basis whatever for suggesting any indifference on the part of the respondent to the safety of appellant, much less any intention to injure him. The licence the appellant had to use the passage behind the counter on earlier occasions would appear to have come from his dealings with Rosewarne, the owner of the garage, in person. There is no evidence that any employee of the garage had anything to do with permitting appellant to use the passage, or had any knowledge that he had permission to use it for any purpose, or that he did, in fact, use it. It is beyond question that Rosewarne did not know that the trap-door was open on the occasion in question. He had done what he could to prevent such an occurrence, by ordering that the trap-door should not be left open, and there is no ground for doubting that this order was generally observed.

Respondent's employee who left the trap-door open no doubt was negligent in the performance of the duty he owed his employer, but there is no evidence that he knew that the appellant, or in fact anyone except the owner and his employees, ever used the passage behind the counter. Further, the occasions on which appellant had a bottle to leave, and used the passage for that purpose, were infrequent. This was the first occasion in some months, and no one at the garage could know that he would come in on that day and would use the passage. No employee, therefore, could have been expected, reasonably, to have in mind any need for care in closing the trap-door for appellant's safety. It is a rule applicable perhaps equally to licensees and trespassers that if the employee knew—or ought to have known—of the presence of the licensee, and, acting within the scope

of his employment, did something to injure him, or failed to take reasonable care not to injure him, his employer may be liable for injury done. There are numerous cases that deal with such a situation: *Tough v. The North British Railway Company*, [1914] S.C. 291; *Thatcher v. The Great Western Railway Company* (1893), 10 T.L.R. 13; *Perdue v. Canadian Pacific R.W. Co.* (1910), 1 O.W.N. 665, 15 O.W.R. 836, affirmed 12 C.R.C. 216; *King v. Northern Navigation Co.* (1912), 27 O.L.R. 79 at 84, 6 D.L.R. 69; *The Acadia Coal Company, Limited v. MacNeil*, [1927] S.C.R. 497, [1927] 3 D.L.R. 871, 33 C.R.C. 49. There is no evidence here to bring the act of the employee in this case within the principle, and to fasten liability upon the respondent. The act of opening the trap-door and leaving it open might have been such an act as described, if the employee knew, or had any reason to think, that appellant might use the passage. There is no evidence of anything of the kind.

The appeal, in my opinion, fails, and should be dismissed, with costs.

FISHER J.A.:—This is an appeal by the plaintiff from the judgment of Chevrier J., in an action tried without a jury, for damages suffered by the plaintiff in falling through an opening into the cellar below on the defendant's premises.

The accident occurred in a garage occupied and operated by a man named Rosewarne, in Bracebridge, on 1st August 1941. The appellant, a hospital superintendent in Toronto, had for some years occupied during the summer months a cottage in the Muskoka district. The water for drinking purposes at the cottage was doubtful in quality, and for some years prior to August 1941, the appellant was in the habit of calling at the garage with large empty bottles and there having them filled with water, and it was also his habit to leave empty bottles in the garage and thereafter to call and take them away at his convenience. It was no part of the defendant's business to supply water or store bottles. The permission given to the appellant was entirely gratuitous. It was also the habit of the appellant to have his motor car serviced with gasoline and oil at the pump standing in front of the garage. The appellant had, I think, left in the care of the proprietor the season before a large empty bottle and on 1st August 1941 he entered the garage and spoke to Rosewarne, who was then in his office and busy with a customer

named Freemantle, and asked him for the large empty bottle he had left with him. Rosewarne immediately left his customer to search for the bottle, and returned with it and delivered it to the appellant. The appellant took this bottle out to his car, then standing at the pump, and left it there, and again returned with another bottle and asked Rosewarne if he might leave the bottle in the garage until he would call for it. Rosewarne who was at that time engaged with his customer said to him "leave it there", at the same time pointing to a place on the floor near the cash register and not far from the office door, and without any more being said Rosewarne resumed his business relations with Freemantle. Then what happened was this: the appellant, unnoticed by Rosewarne, who, as stated, was busy with his customer, instead of leaving the bottle at the place designated, appears to have carried it to a passageway behind a counter and down the aisle to the end thereof, where there was an opening in the floor, for the use of employees in the operation of the garage, going to the cellar below, and through that opening the appellant fell with the bottle. The photographs, put in as exhibits at the trial, clearly indicate the location of the office, the cash register and also the passageway behind the counter down to the opening in the floor at the end of the aisle or passageway. On the inside of the aisle there were shelves upon which accessories were kept for the business of the garage. Those shelves were about five feet from the ground floor and it would appear from the evidence that when the appellant was carrying the bottle down the passageway he must have been looking for a shelf to put it on and was not looking at the floor to watch where he was going. The foregoing is, I think, a fair statement of the facts.

Freemantle corroborated Rosewarne's evidence and swore that he distinctly heard Rosewarne say to the appellant, when he asked permission to leave the bottle, to "put it there", and that at the same time he indicated a place near the cash register. The learned judge in his reasons stated that he believed the respondent's and Freemantle's evidence and refused to accept the appellant's, being dissatisfied with his demeanour and also with contradictions found in his examination for discovery and his evidence given in the witness box.

The trap-door was for employees only and was located where customers, without permission, had no right to be. Mr. Hughes urged that as the respondent knew the appellant had left bottles

a short distance along this passageway or aisle in previous years, he had the right to assume and was entitled to go where he did in 1941. Whatever rights the appellant had as a licensee in the garage property in 1940 or in previous years gave him no right whatever to disregard the instructions he had been given by the respondent in August 1941. The respondent being, as stated, busy with his customer, did not see the appellant go to the passageway with his bottle, did not know the trap-door was open at the time—and for all any one knows it might have been opened a moment or two before—and therefore had no opportunity to warn him of any danger.

I am clearly of the opinion that the appellant was a restricted licensee and confined to the place specially designated for him to go. But even if the appellant had a right to go where he did, according to the evidence of Mitchell the engineer—whose evidence the learned judge believed—there was ample natural light at the end of the aisle for the appellant, had he been watching his step and exercising ordinary care, to have seen the opening and avoided it.

We were referred to a great many cases by both counsel, but as the law for many years has been so well settled, that the only duty an occupier owes to a licensee is to warn him of any concealed danger, of which the occupier was aware, in the premises where the licensee was entitled or was expected to go. I do not see that any useful purpose is served in discussing and distinguishing the cases to which we were referred, and especially since in the case at bar the licensee was a specifically restricted one.

For the reasons I have given my conclusion is that the trial judge was right in dismissing this action, and I would dismiss the appeal with costs.

GILLANDERS J.A.:—I agree that this appeal should be dismissed.

The question involved is whether or not, in the circumstances of this case, there is any liability in law on the defendant for injuries received by the plaintiff while on premises occupied by the defendant, which injuries, it is alleged by the plaintiff, were due to the dangerous condition of the defendant's premises. Similar questions arising from varied sets of circumstances have proved a frequent source of litigation and have provided material for some difference of judicial opinion. Liability in such a case

depends on ascertaining whether or not there has been a breach of duty to take care which has caused or contributed to the plaintiff's injury. In any particular case this depends upon inquiring as a first step in what relationship the parties stood to each other at the time and under the existing circumstances (*Robert Addie and Sons (Collieries), Limited v. Dumbreck*, [1929] A.C. 358). ". . . the duty of the owner or occupier to use care, if it exists at all, is graduated distinctly, though never very definitely measured. . . . Contractual obligations of course stand apart. The lowest is the duty towards a trespasser. More care, though not much, is owed to a licensee—more again to an invitee": *Latham v. R. Johnson & Nephew, Limited*, [1913] 1 K.B. 398 at 410.

It is desirable, therefore, at the outset to have clearly in mind the relationship in which the parties stood. The learned trial judge, after reviewing relevant evidence, found "that the accident did not happen when the plaintiff was on the premises as an invitee but that it happened when he was licensee."

It is not, and could not reasonably be, suggested that in coming on the defendant's premises the plaintiff was a trespasser. It is suggested that any licence which should be inferred from the circumstances did not extend to going to the end of the passage behind the counter, or into the last or fourth aisle and on the very spot where the plaintiff fell. In going there he could not, however, be considered a trespasser, and I am in agreement with the conclusion of the trial judge that at the time the accident happened, the plaintiff and defendant stood in the relationship of licensee and licensor.

On that basis, what was the nature of the duty which the defendant owed to the plaintiff? This has been stated and defined in various cases. Subject to one comment this may be stated as it applies to the case at bar in the words of Lord Wrenbury from the authoritative decision in *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74, at 95, 96, 97:

"The licensee must take the premises as he finds them; but this is apart from and subject to that which follows as to concealed dangers. The owner must not expose the licensee to a hidden peril. If there is some danger of which the owner has knowledge, or ought to have knowledge, and which is not known to the licensee or obvious to the licensee using reasonable care, the owner owes a duty to the licensee to inform him of it. If

the danger is not obvious, if it is a concealed danger, and the licensee is injured, the owner is liable. But something must be said as to the meaning of 'obvious'. Primarily a thing is for this purpose obvious if a reasonable person, using reasonable care, would have seen it. But this is not exhaustive unless the words 'reasonable care' are properly controlled. There are some things which a reasonable person is entitled to assume, and as to which he is not blameworthy if he does not see them when if he had been on the alert and had looked he could have seen them. For instance: if one step in a staircase or one rung in a ladder has been removed in the course of the day and a man who had used the staircase or the ladder in the morning comes home in the evening finding the staircase or ladder still ostensibly offered for use, and comes up or down it without looking out for that which no one would reasonably expect—namely, that a step or rung has been removed, he has nevertheless suffered from what has generally been called 'a trap', although if he had stopped and looked he would have seen that the step or rung had been removed. He was not guilty of negligence, he was not bound to look out for such an unexpected danger as that, although if he had proceeded cautiously and looked out it would have been obvious to him. He was entitled to assume there was no such danger. An instance of such a case is afforded by *Indermaur v. Dames, supra*: the gasfitter was entitled to assume that the floor was throughout covered by flooring boards. There was an unfloored opening left at the entrance to a shaft, and it was not fenced. A workman habitually employed on the premises would probably have failed to recover. The gasfitter recovered, the jury having found that he was not negligent. In such a case the question whether the plaintiff was negligent or not is one of fact."

Although it is not of importance in this case, counsel for the appellant properly points out that no reliance is placed here on the proposition that the owner owes a duty to the licensee to inform him of any danger of which he "ought to have knowledge".

A similar statement was made by Lord Hailsham L.C. in *Addie v. Dumbreck, supra*; vide the remarks on this point in *Coates et al. v. Rawtenstall Borough Council, [1937] 3 All E.R. 602 at 606*, by Greer L.J. and at p. 607 by Slesser L.J.; vide also

Sutcliffe v. Clients Investment Company, Limited, [1924] 2 K.B. 746.

Did the plaintiff suffer damage caused by a concealed or hidden danger, the existence of which was known to the defendant and of which no warning was given?

On this point due weight must be given and regard had for the findings of fact of the trial judge. He has found, *inter alia*, that:

“(4) The passageway where he was walking was sufficiently lighted by natural light.

“(5) There was sufficient natural light in stall no. 4 at the time of the accident for anyone using ordinary reasonable care and prudence to have seen that the cellar trap was open, without the necessity of having lights on in the cellar itself.

“(6) The location of the open trap-door, under the natural lighting conditions such as I have found them to exist at the time of the accident, was a danger which a person using reasonable care and skill could have avoided, even if that person did not know the premises.”

There is considerable evidence in the record and some conflict of evidence as to the sufficiency of the lighting at the place where the cellar trap was located. This being a question of fact, this Court should accept the findings in that regard made by the trial judge, supported as they are by the evidence.

It is to be noted that in making these findings the trial judge has stated that he accepts the evidence of the engineer witness who testified as to the lighting conditions generally of the premises. Furthermore, he expressed some preference for the evidence of the defendant as opposed to that of the plaintiff. In addition to the evidence of the natural lighting conditions at the point where the accident happened, the defendant testified that at that time an electric light was burning in the cellar and that this would silhouette the trap-door opening in the floor. It is urged, therefore, that the opening should have been quite apparent either by reason of the adequacy of the natural lighting conditions, or, if this was insufficient, by the fact that a light was burning in the cellar and would silhouette the opening. But the question as to whether the danger was hidden in a case such as this bears careful consideration, as the words of Lord Wrenbury in *Fairman v. Perpetual Investment Building Society*, *supra*, quoted above, indicate.

In that same case Lord Buckmaster, in his opinion, states:

" . . . but if the defect, though apparent, gives rise to a danger which is not obvious to a person lawfully using the premises, either on business or having a material interest in their use, and exercising ordinary care and possessing ordinary powers of observation, then the landlord is responsible. . . . The degree of danger, and the extent to which it is concealed, may vary from case to case, and its ultimate determination is a question of fact for which a jury is an appropriate tribunal."

There have been cases and there may be various sets of circumstances where persons falling in an unguarded opening have been and could be held to be exercising reasonable care. *Vide Denny v. The Montreal Telegraph Co.* (1879), 42 U.C.Q.B. 577, affirmed 3 O.A.R. 628, where the plaintiff, an invitee, fell through an open trap-door in a part of the defendant's office appropriated for the use of the public; *Indermaur v. Dames* (1866), L.R. 1 C.P. 274, where the plaintiff was also an invitee; *Dickson v. J. A. Scott (Limited)* (1914), 30 T.L.R. 256, where the plaintiff fell down an open hatchway which, owing to the darkness, he could not see.

There are other cases where in different circumstances a different result was reached, e.g., *Wilson, Sons & Co. Lim. v. Barry Railway* (1916), 86 L.J.K.B. 432.

Conclusions and expressions of opinion in other cases must be read in the light of the facts there existing, and applied with caution and reserve. The question here must be approached with due regard to the findings of fact and the existing circumstances. From the evidence it is doubtful whether the plaintiff had ever previously actually proceeded to the end of the passage behind the counter, or had ever entered the fourth aisle, where he fell. He had exercised his privilege as a licensee in connection with the placing or taking out of his water bottles only very infrequently since the practice first commenced, several years prior to the accident. Had he been an invitee and gone where he fell on the express invitation of the occupier, it might be that he could have assumed that there would be no unguarded openings (*Denny v. Montreal Telegraph, supra*), or had the trapdoor been down he would no doubt be entitled to step upon it assuming it to be safe, although it should break when he put his weight upon it (*Holmes v. The North Eastern Railway Company* (1869), L.R. 4 Ex. 254), or had he had recent experience

of walking in this very place and finding it safe, he might reasonably have assumed the condition to be unchanged, without looking. (See remarks of Lord Wrenbury in *Fairman v. Perpetual Investment Building Society, supra*). But such circumstances are not present in this case.

As indicated, the evidence shows an extremely limited exercise of the licence. The plaintiff says he had not been in the passage behind the counter for a year. It is not clear that he had at any previous time walked as far as the point at which he fell. He says he was looking for a shelf that would accommodate the bottle which he had in his hand. He saw a space that he thought suitable and turned in to place the bottle on the shelf. He went forward without looking at the floor to observe where he was going. If he had looked, the danger would have been obvious. Keeping in mind the findings of the trial judge and the circumstances of the case, the opening in the floor must be viewed as both obvious and apparent to one in the position of the plaintiff exercising "reasonable" care. Concluding as I do that there was *qua* the plaintiff no hidden danger or peril it follows that the plaintiff's action must fail since there has been no breach of duty on the part of the defendant.

In this view of the case it is unnecessary to discuss whether or not there was any duty to warn. If the defect were viewed as a hidden danger there would be a duty on the defendant to warn if the existence of the danger was known to the defendant. The defendant Rosewarne had no actual knowledge that the cellar entrance was open. It is conceded that it must have been opened by one of his workmen, but there is no evidence that this servant knew of the plaintiff's presence. Whether by reason of such "constructive" knowledge, although there was no actual knowledge, there was a duty to warn the plaintiff, is a question on which I find it unnecessary to express an opinion.

The consideration of whether the danger was obvious to one using reasonable care, has already involved some consideration of contributory negligence on the part of the plaintiff. Where there is a breach of duty on the part of the defendant, it has been held here that contributory negligence on the part of the plaintiff may in a proper case not be a complete defence, the blame being apportioned between the parties: *Gillingham v. Shiffer-Hillman Clothing Manufacturing Co. et al.*, [1933] O.R. 543, [1933] 3 D.L.R. 134, and on appeal to the Supreme Court

of Canada, *sub nom. Greisman v. Gillingham et al.*, [1934] S.C.R. 375 at 386, [1934] 3 D.L.R. 472.

Proceeding as he was, the plaintiff might have received injury from various conditions both apparent and obvious to one who took the precaution to look, but dangerous if one proceeded on the assumption that the portion of the floor on which he was proceeding was similar in arrangement to other parts. There might indeed have been a step down at this particular place, or a step up, or goods or boxes on the floor. The plaintiff lacked previous experience at this particular place which entitled him to assume that the floor level and conditions there were the same as those in the passage which he had traversed. He was only a bare licensee. He was bound at least to look where he was going.

The trial judge has found, in addition to the relevant findings already quoted,

"(7) That it was negligence on the part of the plaintiff to have walked to said stall without looking where he was walking.

"(8) That said negligence was the sole cause of the accident."

I see no ground on which the finding of the learned trial judge that the negligence of the plaintiff was the sole cause of the accident should be disturbed.

The appeal, therefore, must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Hughes, Agar, Thompson & Amys, Toronto.

Solicitors for the defendant, respondent: Phelan, Richardson, O'Brien & Phelan, Toronto.

[BARLOW J.]

Re Thompson Estate.

Trusts and Trustees—Right of Trustee to Reimbursement for Charges and Expenses—Solicitor and Client Costs of Litigation—Beneficiary of Trust Suing Executors and Trustees.

It is well settled that executors or trustees, if they have not been guilty of misconduct, are entitled to recoup themselves for all costs, charges and expenses properly incurred in the execution of the trusts. *Worrall v. Harford* (1802), 8 Ves. 4 at 8; *Smith v. Beal* (1894), 25 O.R. 368, applied. These charges constitute a first charge on the estate, and take priority over the rights of any beneficiary, and over the rights of an assignee of a beneficiary, even if the assignment is earlier in date. *Stott v. Milne* (1884), 25 Ch. D. 710; *In re Knapman; Knapman v. Wreford* (1881), 18 Ch. D. 300, quoted and applied.

Where the beneficiary of a trust sued the executors and trustees of the estate, in connection with the trust, and her action was dismissed with costs, *held*, the party and party costs should be paid out of the income of the trust, to which the beneficiary was entitled, and the balance of the solicitor and client costs should be paid out of the capital of the trust. Although the executors' defence was of benefit to the estate as a whole, it would be inequitable to direct payment of these costs out of the residuary estate. *Re Fraser Estate* (1897), 30 N.S.R. 272, applied. Since the courts, in the action, had held that the executors had been justified in severing in their defences, they were entitled to two sets of solicitor and client costs.

Held, further, the executors were entitled to raise this question for determination, and the Court had jurisdiction to deal with it, on a motion for advice and direction. It could not be contended that the matter was one for the discretion of the judge who tried the action, since his discretion extended only to party and party costs, with which he had dealt. What the Court was being asked to deal with here was not costs as such, but costs which had become charges and expenses. *In re Beddoe; Downes v. Cottam*, [1893] 1 Ch. 547, applied.

A MOTION by the executors and trustees of the estate of Alexander Montgomery Thompson, deceased, for the opinion, advice and direction of the Court upon certain questions arising in the administration of the estate. The facts, and the questions submitted, are fully set out in the reasons for judgment.

9th December 1943. The motion was heard by BARLOW J. in Weekly Court at Toronto.

R. F. Wilson, for the executors and trustees.

J. R. Cartwright, K.C., for Edythe G. Lamport and the Bank of Montreal, assignee.

J. H. Amys, for assignees of the rights of other beneficiaries.

14th December 1943. BARLOW J.:—An application by the executors and trustees of the last will and testament of Alexander Montgomery Thompson for the opinion, advice, and direction of the Court upon the following questions arising under the administration of the estate of the deceased:—

"(1) Are the executors entitled to recoup themselves in respect to the Solicitor and Client Costs of Messrs. Hughes, Agar & Thompson, and Messrs. Armstrong & Sinclair, in connection with the action of Edythe G. Lamport vs. Stanley Alexander Thompson and Chartered Trust and Executor Company, Executors and Trustees of the Last Will and Testament of Alexander M. Thompson, deceased, and Trustees of the Edythe G. Lamport Trust, and the said Stanley Alexander Thompson in his personal capacity and as Administrator ad litem of the Estate of Harry Alcroft Thompson and Chartered Trust and Executor Company, as taxed out of the income or out of the corpus, or out of both the income and the corpus of the Edythe G. Lamport Trust.

"(2) If the answer to Question 1 is that the executors are entitled to recoup themselves out of both the income and the corpus of the Edythe G. Lamport Trust, then on what basis or in what proportions are said costs to be apportioned as between income and corpus.

"(3) Are the Executors entitled to recoup themselves in respect to the Solicitor and Client Costs of Messrs. Hughes, Agar & Thompson, and Messrs. Armstrong & Sinclair, in connection with the action of Edythe G. Lamport vs. Stanley Alexander Thompson and Chartered Trust and Executor Company, Executors and Trustees of the Last Will and Testament of Alexander M. Thompson, deceased, and Trustees of the Edythe G. Lamport Trust, and the said Stanley Alexander Thompson in his personal capacity and as Administrator ad litem of the Estate of Harry Alcroft Thompson and Chartered Trust and Executor Company, as taxed out of the income or out of the corpus, or out of both the income and corpus of the residuary estate of Alexander M. Thompson, deceased.

"(4) If the answers to both Question 1 and Question 3 are in the affirmative, then on what basis or in what proportions are the said costs to be apportioned as between the Edythe G. Lamport Trust and the residuary estate of Alexander M. Thompson, deceased."

The late Alexander Montgomery Thompson died on or about 18th October 1929, and probate of his last will and testament was granted on 4th December 1929 to Harry Alcroft Thompson, Stanley Alexander Thompson, and Chartered Trust and Executor Company, the executors named in the will.

Amongst other trusts is a trust requiring the executors to set apart for the benefit of Edythe G. Lamport the sum of \$100,000 and to pay the income to her. The trust provides that should Edythe G. Lamport become a widow, she is to receive the corpus of the said trust. Should she, however, predecease her husband, then the amount of the trust reverts to and becomes part of the residue, and is to be divided equally between Harry Alcroft Thompson and Stanley Alexander Thompson, who are the residuary beneficiaries. The husband of the said Edythe G. Lamport is still living, and she is only entitled to the income from the said trust fund.

By a family agreement dated 7th August 1931, provision was made, among other things, for the setting aside of \$88,200 as a trust fund in lieu of the \$100,000 fund provided for in the will.

On 19th March 1937, Edythe G. Lamport commenced an action against the executors and trustees of the said estate claiming, among other things, that the agreement of 7th August 1931 should be set aside. This litigation was carried by the plaintiff as far as the Supreme Court of Canada, without success to the plaintiff in any of the courts.

By reason of the allegations of the plaintiff in these proceedings, the defendants separated their defences, one defence being filed by the trust company and another defence being filed by the individual executors. It was held by the Court of Appeal that the defences had been quite properly separated, and that the defendants were entitled to two sets of costs.

The party and party costs of the Chartered Trust and Executor Company were taxed and allowed at \$5,003.40. The party and party costs of the individual defendants were taxed and allowed at \$3,766.95. Executions were issued as against Edythe G. Lamport with respect to the party and party costs, and the sheriff has made a return of *nulla bona*. Subsequently, namely on 12th March 1943, the solicitor and client costs of the Chartered Trust and Executor Company, which include party and party costs, were taxed and allowed at \$8,493.54, and on 19th May 1943 the solicitor and client costs of the individual executors were taxed and allowed at \$6,873.04. On both of these taxations Edythe G. Lamport appeared by counsel.

Edythe G. Lamport is personally liable for the party and party costs. The income to which she is entitled from the trust

fund mentioned above has accumulated in sufficient amount almost to pay the party and party costs.

Upon the argument, counsel for all parties appeared to be quite content to have the party and party costs satisfied out of the trust fund income, to which Edythe G. Lamport is entitled. The solicitor and client costs, over and above party and party costs, to be recovered by Chartered Trust and Executor Company are \$3,490.14, and the solicitor and client costs, over and above party and party costs, to be recovered by the other trustees are \$3,106.09. The question to be decided is, should these costs and expenses of the trustees be paid out of the Edythe G. Lamport trust fund or out of the residue?

It must be admitted that the executors were entitled to defend this litigation, and that their defence was for the benefit of the estate. It must further be admitted that the executors have not been guilty of any misconduct. The law is well settled that where executors or trustees are not guilty of misconduct they are entitled to be recouped all costs, charges, and expenses properly incurred in the execution of the trusts of the estate. See *Worrall v. Harford* (1802), 8 Ves. 4 at 8, 32 E.R. 250, where Lord Eldon L.C. says:

"It is in the nature of the office of a trustee, whether expressed in the instrument, or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust."

In *Smith v. Beal* (1894), 25 O.R. 368 at 382, Meredith J. says:

"The general rule plainly is that trustees, who have not been guilty of misconduct, are entitled to be recouped their costs; they are entitled to full indemnity out of the trust estate against costs, charges, and expenses not improperly incurred." For reference see *In re Llewellyn; Llewellyn v. Williams* (1887), 37 Ch. D. 317 at 327; *In the Estate of William Plant; Wild v. Plant*, [1926] P. 139 at 155, 156: Underhill, Law of Trusts and Trustees, 9th ed., pp. 465, 468.

Counsel for Edythe G. Lamport contends that it is now too late to ask that the solicitor and client costs be paid out of the estate; that such costs should have been dealt with at the trial of the action. I cannot agree with him.

The trial judge quite properly disposed of the party and party costs. The solicitor and client costs of a trustee, however, are part of the charges and expenses and are not a matter to be dealt

with by the trial judge. The trial judge has a discretion which he may exercise as to the party by whom the party and party costs shall be borne. That is not this case. No question of the exercise of a discretion arises, because I am not asked to deal with costs as such, but with costs which are in the category of charges and expenses of a trustee.

In *In re Beddoe; Downes v. Cottam*, [1893] 1 Ch. 547 at 554, Lindley L.J. says:

"Although costs are costs when they are incurred, the moment you come to ask that they shall be borne as expenses by a particular fund, or by persons not parties to the proceedings in which they were incurred, they become, not costs, but charges and expenses."

This is an application to determine what fund shall bear the charges and expenses of the trustees arising out of the litigation instituted by Edythe G. Lamport against the executors.

The general rule is that a trustee's costs, charges and expenses are paid out of capital unless there is a direction to the contrary, or unless the costs, charges and expenses are incurred expressly with reference to income. See Godefroi on Trusts and Trustees, 5th ed., p. 698. In the case at bar the costs were incurred with respect to capital, and they should, in my opinion, be paid out of capital.

It, therefore, falls to be determined whether the said costs shall be paid out of the residue or out of the Edythe G. Lamport trust. The whole action was with respect to the Edythe G. Lamport trust. Is it equitable that the residuary estate should bear the costs in question? I fully agree with counsel's contention that the right of trustees to costs depends on whether or not the defence of the action was for the benefit of the estate. If the action had succeeded, the residuary estate would have been used to supplement the Edythe G. Lamport trust. The action failed and the residuary estate remained untouched.

Counsel for Edythe G. Lamport contends that the successful defence of the action benefited the residuary estate, and that the residue should bear the costs. If this were permitted, it seems to me it would be inequitable and would put a premium on legatees taking proceedings, knowing that their legacies would not be called upon to bear the expenses incurred by the trustees in the defence of such an action. I am of the opinion that this would be unfair and inequitable. Furthermore, the litigation

was with respect to this particular trust. It therefore follows, in my opinion, that the trustees' costs and expenses should be borne by the Edythe G. Lamport trust. The residuary beneficiaries should not have their share of the estate eaten up by costs incurred as the result of an action brought by the beneficiary of the trust. See *Re Fraser Estate* (1897), 30 N.S.R. 272 at 274, where Ritchie J. says:

"If executors and legatees wish to indulge in having nice points of law settled which do not materially affect their rights, or arise out of the construction of the will, they must, in my opinion, do so at their individual expense, and not at the expense of the estate, or, in other words, at the expense of the residuary legatee, who has had nothing whatever to do with these proceedings, and has not been heard on the question of costs."

See also *Jenour v. Jenour* (1805), 10 Ves. 562, 32 E.R. 963; *Lamb et al. v. Cleveland* (1891), 19 S.C.R. 78 at 82; *In re Chennell*; *Jones v. Chennell* (1878), 8 Ch. D. 492.

Counsel for Edythe G. Lamport contends that only one set of solicitor and client costs should be allowed. I cannot agree with him. The Court of Appeal has held that the defendants were justified in separating their defences. The trustees are entitled to be reimbursed for their costs and expenses properly incurred. I cannot find on the material before me that any of these expenses were not properly incurred, and the contention of counsel for Edythe G. Lamport therefore fails.

Counsel for John A. Norris, Levy Brothers and Langley's Limited, assignees of certain beneficiaries, contends that because the assignments were given prior to the issue of the writ in the action in which the costs and expenses in question were incurred, they were entitled to take priority. I cannot agree with him. The law, in my opinion, is well settled that the charges and expenses of a trustee are a first charge on all trust property, both income and corpus, and that an assignee who takes an assignment from a legatee or beneficiary takes such assignment at his own risk, and furthermore, that such assignee can acquire no higher rights than those of the legatee or beneficiary: *Stott v. Milne* (1884), 25 Ch. D. 710 at 715, where the Earl of Selborne L.C. says: "The right of trustees to indemnity against all costs and expenses properly incurred by them in the execution of the trust is a first charge on all the trust property, both in-

come and *corpus*." See also *In re Knapman; Knapman v. Wreford* (1881), 18 Ch. D. 300 at 304, where Hall V.C. says:—

"Therefore, every person who takes an assignment of a legacy from a legatee, takes it subject to there not being assets to satisfy it, from different causes, it may be from loss incurred with reference to the estate, or from the estate not proving sufficient, or from its being exhausted, or having to be resorted to for the payment of the costs of administration. . . . Neither the legatee nor any person claiming under the legatee can claim anything until the debt be satisfied."

It must, therefore, be found that the charges and expenses of the trustee take priority over any rights of the assignee of any benefit in the estate. For the above reasons I find that the solicitor and client costs of the executors, over and above the party and party costs (which latter costs are being paid out of the income of Edythe G. Lamport, she being personally liable for such costs) shall be paid out of the capital of the Edythe G. Lamport trust and that the executors be authorized to raise sufficient funds out of the said capital to pay the same.

This is a necessary motion and is not a matter for determination by the trial judge of the action. The motion being necessary as a result of the litigation commenced by Edythe G. Lamport, the costs of the applicant and of counsel for the assignees other than the Bank of Montreal will be payable out of the capital of the Edythe G. Lamport trust in the same manner as the costs and charges of the trustees; the costs of the applicant to be taxed on a solicitor and client basis.

Order accordingly.

Solicitors for the executors and trustees: Day, Ferguson, Wilson & Kelly, Toronto.

[COURT OF APPEAL.]

Schoeni et al. v. King et al.

Nuisance—Failure to Take Proper Precautions on Land Adjoining Highway—Sand-pile and Mortar-box so Placed as together to constitute Nuisance, partly on Highway and partly on Adjoining Land—Independent Contractor.

The defendants were building a house upon their land, and one C. had a contract for the brick work. C. placed a box for mixing mortar, partly upon the defendants' land and partly on the adjoining highway. Beside this box, and mostly upon the highway, was a pile of sand, the property of the defendants, placed there and renewed from time to time on the defendants' orders. C.'s employee, as part of the operation of making mortar (which was done every other day), mixed lime with water, and left the mixture standing for two hours to slack, during which time the box was uncovered and unguarded. This process of slackening the lime generated great heat, and the box at such times was very dangerous. Children of the neighbourhood, including the infant plaintiff, were in the habit of playing on the sand-pile, and, although repeatedly sent away by C. and others, constantly returned. On one occasion, while playing on the sand-pile, the infant plaintiff fell or slipped into the mortar-box, where lime was then being slackened, and was severely burned. *Held*, the defendants were liable. The sand-pile, placed beside the mortar-box, constituted a nuisance on the highway. The defendants, who placed the sand-pile there, and therefore attracted the infant plaintiff into a place of danger, were responsible for her injuries, notwithstanding that C., who was an independent contractor, had charge of the mortar-box and of the mixing of mortar in it. The defendants, who were daily at the work, were aware of the whole situation, and it was their duty to remove the sand-pile to a place farther from the highway, where it could be guarded; if this necessitated the removal of the mortar-box as well, such a removal would have been proper.

Judgment of Roach J., [1943] O.R. 478, affirmed.

AN appeal by the defendants King Brothers from the judgment of Roach J., [1943] O.R. 478, [1943] 4 D.L.R. 536, in favour of the plaintiffs. The facts are fully set out in the reasons for judgment of the trial judge, and in the reasons now reported.

14th December 1943. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and KELLOCK JJ.A.

J. J. Robinette, for the defendants, appellants: There are six main submissions: (1) Any failure on the appellants' part to abate a nuisance, if any, on their property, was not the cause of the accident. (2) The appellants were under no duty towards the infant plaintiff to abate the nuisance on their own property. (3) The periodical slackening of lime in the box was not in law a nuisance. (4) The nuisance which in fact caused the injury to the infant respondent was created by an independent contractor on the highway and the appellants were under no duty to abate a nuisance created by an independent contractor off their own lands. (5) Cadorin was not engaged by the respond-

ents to perform any work on the highway; therefore the cases on which the trial judge relied are not applicable. (6) On the evidence, the real cause of the accident was the failure of the parents properly to supervise the infant's movements. The real essence is that the parents should bear the loss.

The trial judge has imposed too high a duty upon the appellants. Our only duty was to render the portion of the box on our lands free from danger to others. Even if our full duty had been performed the accident would still have occurred. The failure to abate the nuisance on our own land was not the *causa causans* of the accident. This infant respondent was not of a class to whom a duty exists. She did not come within the category of licensee, invitee, or inadvertent trespasser, because she did not get on our property. In examining the English cases it is necessary to remember that the occupier of lands adjacent to a highway has title to the soil of the highway to the centre of the highway. The essential test is the right of control. Beyond the limits of our land we could not force the contractor to behave in any specific way. We could only require him to make the box harmless on our own land. An occupier is not responsible for something done by an independent contractor off the occupier's land. [ROBERTSON C.J.O.: But it was the defendants who placed the sand-pile where it was.]

The lime was slacked every other day, remaining hot for an hour and a half. This was not a continuous affair. This is as much an escape of a dangerous substance from the highway to the land as the converse, for which *Rylands et al. v. Fletcher* (1868), L.R. 3 H.L. 330 is not applicable; Salmond on Torts, 9th ed., pp. 229-232, refers to the loose use of the word "nuisance".

The nuisance on the highway which caused injury to the respondent was caused by an independent contractor. Liability in such circumstances depends on control: *Ewing v. Hewitt* (1900), 27 O.A.R. 296. The liability of an occupier ends at the edge of the premises occupied: *Reid v. Town of Mimico*, 59 O.L.R. 579 at 585, [1927] 1 D.L.R. 235. Cadorin, the independent contractor, was not engaged by the appellants to perform work on the highway, and on this ground the cases relied on by the learned trial judge in his reasons for judgment are not applicable: *Wilson et al. v. Hodgson's Kingston Brewery Co. et al.* (1915), 85 L.J.K.B. 270.

The infant respondent did not receive adequate parental supervision. With reference to the pile of sand, it was almost entirely on the highway. An ordinary pile of sand is not in law an allurement to children: *Liddle v. Yorkshire (North Riding) County Council*, [1934] 2 K.B. 101; *Latham v. R. Johnson & Nephew, Limited*, [1913] 1 K.B. 398.

R. R. McMurtry, for the plaintiffs, respondents: The trial judge has found as a fact that the pile of sand was a definite allurement. The trial judge has also held as a matter of fact that there was no contributory negligence on the part of the parents. The appellants regard isolated pieces of evidence, but it is necessary to consider the evidence as a whole, not in parts.

Cadorin was not an independent contractor within the ordinary meaning of that term. In the case at bar, there are several factors which take Cadorin out of the category of an independent contractor. However, if it is assumed that he was an independent contractor, nevertheless the appellants were responsible for his negligence, as set forth in Wilshire's Common Law, 4th ed., pp. 322 *et seq.*

The trial judge has found as a fact that the appellants did assent to this box remaining on the property, so they must be taken to have acquiesced in its existence. The contractor erected an improper obstruction. He was under a statutory obligation to perform work in a particular manner. There was a by-law passed to prevent this very injury. Where a particular by-law is passed for the benefit of the public and it is disregarded, its breach having resulted in injury to a member of the public, the matter becomes one of actionable negligence: *Schubert v. Sterling Trusts Corporation et al.*, [1943] O.R. 438 at 441-2, [1943] 4 D.L.R. 584; Pike, Canadian Municipal Law, pp. 376-7. The only fair inference from the evidence is that the appellants knew there was not compliance with the by-law. The work was of such a nature that its execution involved danger to other persons, against which proper precautions were not taken, the contractor having failed to take those precautions. The trial judge said the box containing hot lime constituted a public nuisance, the danger from which was aggravated by the pile of sand next to it. Surely, this would render the appellants liable: *Waller v. Corporation of Sarnia* (1912), 4 O.W.N. 403, 23 O.W.R. 831, 8 D.L.R. 629.

In the case at bar the danger is an insidious one, which would not be apparent to the infant respondent. The operation was

inherently dangerous and the appellants are therefore liable for the negligence of an independent contractor. As to allurement, see *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229; Beven on Negligence, 4th ed., p. 186.

J. J. Robinette, in reply: If there was a breach by the appellants of by-law 4076 of the Township of Etobicoke, the breach did not confer on the respondents a civil cause of action for damages: *Wyant v. Welch*, [1942] O.R. 671, [1943] 1 D.L.R. 13. There is no suggestion from the evidence that the appellants consented to the operation of the lime box in a negligent manner. The independent contractor was not employed here to do something on the highway. The trial judge has found that the work for which Cadorin was employed was not of an essentially dangerous character. The case at bar does not come within any of the exceptions set forth in Wilshere's Common Law, 4th ed., pp. 322-323; therefore the normal rule applies and the appellants are not responsible for the negligence, if any, of the independent contractor and his servants. In testing whether Cadorin was engaged to perform services of a dangerous nature, the matter must be regarded as a whole. He contracted to perform the masonry work on the house, which is not inherently a dangerous task: *The City of St. John v. Donald*, [1926] S.C.R. 371, [1926] 2 D.L.R. 185; *Padbury v. Holliday and Greenwood (Limited) et al.* (1912), 28 T.L.R. 494.

Cur. adv. vult.

22nd December, 1943. ROBERTSON C.J.O.:—This is an appeal from the judgment of Roach J., dated 6th July 1943, after the trial of the action before him at Toronto, without a jury. By the judgment damages were awarded the infant plaintiff in the sum of \$3,500, and \$1,285 was awarded her father, who sued as her next friend and also in his own right. The judgment is against the defendants King Brothers only, the action being otherwise disposed of as against the other defendants.

King Brothers, the appellants, are building contractors, and are the owners of certain premises on Strath Avenue, in the township of Etobicoke. They were carrying on certain building operations on these premises, in which mortar was used. One Cadorin had a contract from them to do the work in which the mortar was required. Cadorin set up a box for mixing mortar,

placing the box partly on the front part of the appellants' land and partly on the highway in front of it. The mortar-box protruded over the property line on to the highway a length of approximately 6 feet. Beside the mortar-box, and mainly, if not entirely, on the highway, was a pile of sand supplied by appellants for use in mixing the mortar.

The respondents lived in a house some 200 feet along the street from appellants' lot, and there were no intervening buildings. The infant respondent, then four years old, was attracted by the sand-pile, and, in common with other small children, was in the habit of going there to play. They were often sent away by Cadorin and his men, but they persisted in coming back, and in playing on the sand-pile. On an occasion when lime was being slacked in the mortar-box and was very hot, the infant respondent, while playing on the sand-pile, fell into the mortar-box and was badly burned. It is from this that the action arises.

The trial judge found that that part of the mortar-box into which the child fell was located on the highway. He found that Cadorin, who had placed the mortar-box where it was, was an independent contractor, and he discharged the appellants from liability for negligence. He held, however, that the mortar-box, with its contents, constituted a public nuisance, and while, in his opinion, that nuisance was created by Cadorin, yet the appellants, as the occupants of the land on which the mortar-box was in part placed, had a duty to remove it from their land, and this would have meant removing it from the highway as well. Upon this failure to abate the nuisance, he maintained the action against appellants, and pronounced the judgment now in appeal.

For the purposes of this appeal, appellants' counsel accepted the findings of fact of the trial judge. He contended, however, that the appellants, as owners of the land, were not liable in respect of a nuisance upon their own land—if there was any such nuisance—for an accident that happened on the highway. He contended that it was not enough for the learned trial judge to find that if appellants had abated the nuisance upon their own land by removing the mortar-box, the nuisance on the highway, by the same act, would have been abated as well, and that the proper inquiry should have been whether the alleged nuisance upon the appellants' property was the cause of the injuries.

Appellants' counsel also contended that the mortar-box, in so far as it was upon the appellants' property, was not a nuisance, and that in so far as it was upon the highway, they had no responsibility for it, Cadorin, who placed it there and used it, being an independent contractor.

In my opinion it is not necessary to pass upon these several contentions. The learned trial judge, in his reasons for judgment, said that "considering this case from the standpoint of nuisance, I think the sand and the box together must be considered as a whole; the whole constituted the nuisance." Now the appellants were directly responsible for placing the sand-pile on the highway. It was delivered on their order, and it was their sand. The sand, as appellants ordered it, was brought by truck, and was dumped beside the mortar-box, towards that end of it that projected upon the highway, and the sand-pile spread out as far as the sidewalk, 10 feet from the property line. The supply was replenished from time to time on appellants' order, and appellants, who were daily at the site, undoubtedly knew that their sand was on the highway, and acquiesced in it.

The mortar was made by an employee of Cadorin's. He made fresh mortar every second day. His first operation, in making mortar, was to mix lime with water and to allow it to stand two hours to slack. At this stage the mixture is very hot, and will burn severely any one who falls into it. Later, when sand is mixed in, it cools down. The mortar-box was not covered, and no one stood guard over it while the lime was slackening. This procedure had gone on for a matter of weeks before the accident in question. On this occasion Cadorin's man had prepared his mixture of lime and water after he had had his lunch. He then occupied himself in carrying, sometimes brick and sometimes mortar, to the men engaged in building, leaving the hot lime to stand for two hours, as was his custom.

This was the state of things when the infant respondent, while playing on the sand-pile, slid or fell from the sand-pile into the hot lime in the mortar-box, as the trial judge has found.

This is not a case where it is necessary to enquire and to distinguish whether the infant respondent was a licensee or a trespasser. She was neither. She was on the public highway, where she had a right to be. A useful decision upon the right of children to be upon the public highway, and to play there when there is no by-law to prohibit it, is *Ricketts v. Village of*

Markdale (1900), 31 O.R. 610. In that case the late Chancellor Boyd discusses the broad distinction on historical grounds between the English cases on this subject and the Canadian.

The appellants, on the other hand, had no right to use the highway as a place to deposit the sand for their private building operations, and, more particularly, they had no right to deposit it there immediately beside the uncovered, and frequently dangerous, mortar-box. In my opinion, this was to create a nuisance on the highway, and directly was the cause of the child falling into the mortar-box: *Gloster et al. v. The Toronto Electric Light Company* (1906), 38 S.C.R. 27; *Clement v. Northern Navigation Co. Limited* (1918), 43 O.L.R. 127, 43 D.L.R. 433; *Taylor et al. v. Robinson et al.*, [1933] O.R. 535, [1933] 3 D.L.R. 73; *Harrold et al. v. Watney*, [1898] 2 Q.B. 320.

It is not open to question on the evidence in this case that the sand-pile was a constant attraction for children of the age of the infant respondent. It was an attraction that to them was irresistible. This was seen daily by appellants. There was ample time within which all of this should have been appreciated by appellants, and remedied by them. To send the children away was not enough. It should have been plain to them that a small child at play on the insecure footing of a sand-pile might, at almost any moment, slip or fall from the sand-pile into the mortar-box. By itself the sand-pile was a harmless thing. Probably a child was not in any great danger from the mortar-box either, if it had been by itself, for it had no attraction for a child. The danger lay in the sand-pile immediately beside the mortar-box, and appellants were as much to blame for the creation and the continuance of that danger as Cadorin was.

There was ample time to remove the nuisance before this accident occurred. Instead of removing it, more sand was brought from time to time, and the nuisance was renewed. All that was done was to send the children away, and it was obvious that this had no lasting effect, for soon they were back again. Appellants' duty was to remove the sand-pile from the highway to a place where they could protect it. The mortar-box would, no doubt, have to go along with it, but that would have been as it should be. To maintain on the highway the menace to children of a sand-pile that attracted them, beside a mortar-box that every other day for two hours contained hot lime, and that stood uncovered and unguarded, showed little regard for the rights

of others, and was in utter disregard of the duty not to create a nuisance on the highway, especially a nuisance that might cause injury to one lawfully on the highway.

It is impossible to find negligence on the part of the child. She was doing what one would expect a child of her age to do. The presence of the toys on the sand near the mortar-box is cogent evidence that she was playing on the sand-pile when she fell into the mortar-box. The trial judge expressly so found, and his findings of fact have been accepted. It is suggested that some degree of fault lay with the parents of the child, because they did not keep her shut in and out of danger. This occurrence was in a quiet suburban district, such as is often sought out by the parents of young children, hoping to find for them fresh air and more freedom for play. The suggestion of failure on the parents' part in duty to the child seems strange from those whose fault it was that the child was injured.

I would dismiss the appeal with costs.

GILLANDERS J.A.:—An appeal by the defendants King Brothers from a judgment of Roach J. At the opening of the trial the claims against the defendants Mabel H. King and Ethel M. King were abandoned and the action was ultimately dismissed as against these defendants. The judgment at trial also dismissed the action against the defendant municipal corporation and there is no appeal in that respect.

The learned trial judge found the appellants liable to the respondents for damages suffered resulting from a nuisance.

Counsel for the appellants accepts the facts as fully and clearly found and set out in the reasons of Roach J., reported in [1943] O.R. 478, [1943] 4 D.L.R. 536. He submits, however, that the appellants are, on the facts as found, not liable in law to the respondents for damages.

In considering whether, on the facts found, the appellants are liable on the basis of nuisance, it is desirable to keep in mind how such liability may be founded. The word "nuisance" as applied in law is not capable of exact definition: *Bamford v. Turnley* (1862), 3 B. & S. 66, 122 E.R. 27. There may be numerous and varied kinds of nuisance which might give rise to liability. For the purposes of this case it is possibly sufficient to consider whether or not the appellants were using, or were responsible for the use of, their property in a manner which created a danger to persons using the highway. If their property was so used,

the use or arrangement which created the danger could properly be classed as a nuisance.

Counsel for the appellants urges that liability cannot rest on the appellants based on nuisance because he says the nuisance, if nuisance there was, was not on appellants' lands and had been placed or constructed by an independent contractor for whose acts the appellants are not responsible. In this connection he cites the case of *Ewing v. Hewitt* (1900), 27 O.A.R. 296. In that case the owner of a house abutting on a highway placed, without authority, a trap-door in the sidewalk, in order to obtain an entrance to his cellar, the hinges of the trap-door projecting about an inch above the sidewalk. The defendant obtained title from the owner and continued to use the trap-door. The plaintiff, while lawfully using the highway, stumbled against the hinges and was hurt. The defendant had not constructed the nuisance, and could not be held to be continuing it, and the accident was not caused by her user. She was held not liable. That case is, I think, to be distinguished from the case at bar.

The learned trial judge found, *inter alia*, "This box, containing hot lime and partly on the public highway and partly on the land adjacent thereto, constituted a public nuisance, the danger from which was aggravated by the pile of sand next to it. Indeed, considering this case from the standpoint of nuisance, I think the sand and the box together must be considered as a whole; the whole constituted the nuisance." With this finding I entirely agree. One cannot divorce the sand-pile from the lime-box. The manner in which this particular accident apparently happened lends weight to this view. Whether or not any arrangement or act constitutes a nuisance depends not only on the arrangement or act in itself, but it must be considered in relation to all the circumstances of the case: *vide, e.g., Hollywood Silver Fox Farm, Limited v. Emmett*, [1936] 2 K.B. 468. So, here, it is not necessary to consider whether or not the sand-pile and mortar-box would, in other circumstances, constitute a nuisance. It is only necessary to observe that under the circumstances they were in a locality where the infant plaintiff and other small children lived and were in the habit of using and playing upon the highway. As found by the trial judge, "The adult plaintiff and his family resided in their dwelling, which stood on the west side of Strath Avenue and was in the neighbourhood of 200 feet south of the building which was in the

course of construction. The infant plaintiff was born 30th May 1938, so that at the time of the building operations she was slightly more than four years of age. On many occasions prior to the date of the injuries received by her, she and the other children who were wont to play in and on the sand pile, were chased from it by one of the King Brothers and workmen engaged in the building work, because of the obvious danger of their being injured, either by falling into the mortar box or otherwise. They would remain away for a little time and then return and be chased away again." The finding that such an arrangement under the circumstances constituted a nuisance is, I think, one of fact: *Fleming et al. v. Hislop et al.* (1886), 11 App. Cas. 686; *Bantwick v. Rogers* (1891), 7 T.L.R. 542.

In so far as the nuisance consisted of the sand-pile, the sand was the property of the appellants. It was brought and piled where it was on the highway by the appellants' servants, and any responsibility for it being there must rest on the appellants.

In respect to the mortar-box, it is urged that because it was the property of an independent contractor and had been placed where it was, partly on the appellants' property and partly on the highway, by the contractor, and because the infant fell into the portion on the highway, no responsibility rests on the appellants.

The whole arrangement which constituted the nuisance—the mortar-box and the sand-pile beside it—was placed where it was in connection with the use the appellants were making of their lands—the erection thereon of a house. It was being so used when the infant was injured. Furthermore it is clear that the appellants well knew of its existence and permitted it to continue.

In *Sedleigh-Denfield v. O'Callaghan et al.*, [1940] A.C. 880, Lord Wright, at p. 904, says, in part: "If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise. But he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser, or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become

aware of it. This rule seems to be in accordance with good sense and convenience. The responsibility which attaches to the occupier because he has possession and control of the property cannot logically be limited to the mere creation of the nuisance. It should extend to his conduct if, with knowledge, he leaves the nuisance on his land. The same is true if the nuisance was such that with ordinary care in the management of his property he should have realized the risk of its existence."

The appellants had full knowledge, both of the use being made of the mortar-box and of the frequent presence of the infant plaintiff and other children. On numerous occasions the defendants found the infant plaintiff on the sand-pile and sent her away. It was practically a daily occurrence to find the child playing there.

It would, in the circumstances, be a much too restricted and technical view-point to give effect to the submission that because the end of the mortar-box in which the infant was found was on the highway just outside the appellants' lands, and because it had been placed there by an independent contractor, the appellants are not responsible. The facts here distinguish the case from *Barker v. Herbert*, [1911] 2 K.B. 633.

I agree with my Lord that the appeal should be dismissed, with costs.

KELLOCK J.A. agrees with ROBERTSON C.J.O.

Appeal dismissed with costs.

Solicitors for the plaintiffs, respondents: Farrell, Squires & Gauld, Toronto.

Solicitors for the defendants King Brothers, appellants: Rowan & Robinette, Toronto.

[COURT OF APPEAL.]

Re Gravestock and Parkin.

Taxation—Municipal Tax Sales—Right to Redeem—Person Having no Interest in Land—“any other person”—The Assessment Act, R.S.O. 1937, c. 272, s. 177—Comparison with s. 161.

The words “any other person” in s. 177 of The Assessment Act are not to be construed as *ejusdem generis* with the words “the owner . . . or his heirs, executors, administrators or assigns” which precede them, and a stranger, having no interest in lands sold for taxes, is entitled to redeem them under the section. The specific words are exhaustive of the class of persons claiming through or under the owner, and include such persons as mortgagees, execution creditors, and, probably, holders of mechanics’ liens, and the general words are therefore to be construed according to their ordinary meaning. There is no warrant for saying that the object of the tax sale provisions of the Act is anything more than the collection of arrears of taxes. *Payne v. Goodyear et al.* (1867), 26 U.C.Q.B. 448, referred to. Redemption by such a person gives him no interest in the lands, but merely places matters *in statu quo*. *Boulton v. Ruttan* (1832), 2 O.S. 396 (362B), referred to.

Judgment of Mackay J., [1943] O.W.N. 511, reversed.

AN appeal from the order of Mackay J., [1943] O.W.N. 511, [1943] 4 D.L.R. 506, directing the execution and delivery by the appellants of a tax deed to certain lands. The facts are fully stated in the reasons for judgment.

9th and 10th December 1943. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and KELLOCK JJ.A.

J. E. Anderson, K.C., for the appellants: The sole object of the tax sale provisions of The Assessment Act, R.S.O. 1937, c. 272, is the collection of arrears of taxes; they are not designed to punish a defaulter, or for any other purpose: *McKay v. Chrysler* (1879), 3 S.C.R. 436 at 474; *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531 at 551. There is no such thing as an equitable construction of a taxing Act: *The City of Ottawa v. Egan*, [1923] S.C.R. 304, [1923] 2 D.L.R. 226 at 239. S. 172 of the Act follows directly after the provisions for sale. Its meaning and that of s. 177 are identical; the purpose of the Act comes out in both sections.

The *ejusdem generis* rule should not have been applied to the words “any other person” in s. 177. Subss. 2 and 3 of s. 161 are designed to protect the municipality, which may buy in the property at the tax sale. S. 177 refers to “owner” and not “registered owner”. The question of the persons entitled to redeem was dealt with in *Boulton v. Ruttan* (1832), 2 O.S. 396 (362B), and *McDougall v. McMillan* (1875), 25 U.C.C.P. 75. [KELLOCK J.A.]: The statute was narrower in its meaning when

the *Boulton* case was decided, was it not?] The *McDougall* case was decided after the statute was amended, and the judgment has remained unchallenged. This is the first occasion on which the *ejusdem generis* rule has been invoked. In the light of such decisions as *McDougall v. McMillan*, if the word "owner" is to be broadly interpreted elsewhere, it must be given the same meaning in s. 161. This point must be clarified so that county treasurers may know what they are required to do.

A treasurer is not expected to set up a court of inquiry, and to make a search to ascertain whether a person who signifies his intention of redeeming is the owner. He will naturally assume that the person making the payment is the owner or his agent, and will expect the full arrears to be paid. Under 13-14 Vic., c. 67, the redemption money could be paid only by the owner: Weir, *The Law of Assessment*, p. 383.

The phrase "any other person" is sufficiently wide to include a stranger: *Worthington v. Robbins and Cadigan*, 56 O.L.R. 285, [1925] 2 D.L.R. 80 at 82-3; Manning, *Assessment and Rating*, 1928 ed., pp. 427-430. A change of language in a statute is deemed to signify a change in the law: *The City of Ottawa v. Hunter* (1900), 31 S.C.R. 7 at 10. The addition of the words "or any other person" in *The Assessment of Property Act*, 32 Vic. (1868-9), c. 36, s. 148, broadens the scope of the statute. [ROBERTSON C.J.O.: The contention made against you is that the words "any other person" refer only to persons having an interest in the land. The respondent is not within that class.] The judgment appealed from does not say who is entitled to redeem.

As to the construction of statutes generally I refer to *The Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767, C.R.[8]A.C. 586, 3 Cart. 1. The *ejusdem generis* doctrine is discussed in Beal, *Cardinal Rules of Legal Interpretation*, 3rd ed., pp. 355-6; also in *Ottawa Electric R.W. Co. v. City of Ottawa* (1907), 10 O.W.R. 138, and *Re Ollmann*, 57 O.L.R. 340 at 342, [1925] 3 D.L.R. 1196. The only class specifically described in s. 177 is the owner class. Nothing is said about judgment creditors or lienholders. The trial judge erred in finding that if the words "any other person" included a stranger having no interest in the land as owner, encumbrancer or agent, he would be in a better position than the owner.

The trial judge relied on *Re Lord's Day Act of Ontario* (1902), 1 O.W.R. 312, also reported, *sub nom. Attorney-General*

for Ontario v. Hamilton Street R. Co., 54 C.C.C. 344. I submit that that case, which dealt with the interpretation of a quasi-criminal statute, has no bearing on the case at bar.

S. 178 of The Assessment Act, which is comparatively recent, contemplates payment by owners and encumbrancers as well as other persons.

Under the tax sale provisions of the Act, the municipal corporation and the treasurer both stand in the position of trustees: *Dawson v. The Town of Sault Ste. Marie et al.* (1909), 15 O.W.R. 230 at 233. If there are no heirs, executors, administrators or assigns, or devisees of registered owners, there would be an escheat to the Crown: The Escheats Act, 1942, c. 14, s. 2(1). It was said in *Essery v. Bell* (1909), 18 O.L.R. 76, that by statute, going back as far as 32 Vic., c. 36, s. 107, taxes accrued on any land are made a special lien having preference over any claim, lien, privilege or encumbrance of any party except the Crown.

A sale for taxes is a contract, and an originating notice of motion for prerogative *mandamus* is not an appropriate proceeding: Holmested and Langton, Ontario Judicature Act, 5th ed., p. 73; *Poole v. Township of Bucke* (1923), 24 O.W.N. 163, affirmed 25 O.W.N. 358. The county treasurer is under a duty to show that the proceedings at the tax sale were regular: *Re Wescott et al. and The County of Peterborough* (1873), 33 U.C.Q.B. 280.

G. T. Walsh, K.C. (C. G. Frost with him), for the respondent: The whole case depends upon the construction of the words "or any other person". Our proceedings were appropriate, and all the facts were before the trial judge. The words "any other person", being general words following particular classes specified by name, must be restricted to persons *ejusdem generis* with the particular classes. Wood, in attempting to redeem, was not acting for the benefit of the owner, but was simply attempting to prevent the sale to us. This property had not been assessed for over half a century. Our agreement with the municipality should be enforced.

Tax sales are for two purposes: (1) to get in past revenue; (2) to obtain a purchaser who has an interest in the land and will probably pay future taxes. "Any other person" must mean someone who has an interest in the property, and be limited to such persons as lienholders, judgment creditors, and encumbrancers. They cannot extend to include an absolute stranger.

There is no question of the right of anyone, even a complete stranger, to pay taxes before the tax sale, but after the sale the position is altered. The object of the Act will be attained by applying the *ejusdem generis* rule. The sections following s. 177 should be considered in conjunction with it. When s. 177 is read with ss. 161 and 178, the words "any other person", by the application of the *ejusdem generis* doctrine, are limited to the "owner" class. If they are extended to include a stranger, he also can redeem for the purchase price plus ten per cent., and will thus be placed in a more favourable position than the owner, who, if the lands have been sold for less than the arrears, must pay the full arrears.

The Court should not adopt the statement in Manning, Assessment and Rating, 2nd ed., p. 481 or in Weir, The Law of Assessment, pp. 382-3. *McDougall v. McMillan* (1875), 25 U.C.C.P. 75; *Fonseca v. Schultz* (1891), 7 Man. R. 458; *Boulton v. Ruttan* (1832), 2 O.S. 396 (362B); *Allan v. Hamilton* (1863), 23 U.C.Q.B. 109; *Cunningham v. Markland* (1838), 5 O.S. 645, do not support the proposition that, under the present Ontario law, a stranger is entitled to redeem.

J. E. Anderson, K.C., in reply.

Cur. adv. vult.

22nd December 1943. The judgment of the Court was delivered by

KELLOCK J.A.:—This is an appeal by George W. Parkin and F. L. Weldon, warden and treasurer respectively of the County of Victoria, from an order of Mackay J., dated 7th July 1943, giving effect to the application of the respondent for a *mandamus* to compel appellants to execute and deliver a tax deed of certain lands of which the respondent became purchaser at a tax sale which took place on 15th October 1941.

It appears that on 2nd June following, one Wood paid to the treasurer the amount necessary to redeem the lands from the tax sale, whereupon the treasurer refunded to the respondent the amount of the purchase price plus ten per cent. This refund was made by cheque, which the respondent refused to accept. Upon the refusal of the appellants to execute a tax deed to him of the lands in question, the respondent launched the motion for *mandamus*.

It does not appear that Wood had any interest in the lands in question. He was served with notice of the motion and, although present during the argument in the court below, he filed no material and did not indicate any desire to be heard.

The respondent contends that Wood was not entitled to redeem the lands, and the learned judge has given effect to this contention, being of opinion that the phrase "any other person" in s. 177 of The Assessment Act, R.S.O. 1937, c. 272, is to be construed as *ejusdem generis* with the words "the owner . . . or his heirs, executors, administrators or assigns" and does not include a stranger having no interest in the lands. The learned judge was further of opinion that to hold otherwise would enable an owner, by entering into a collusive arrangement with a stranger, to redeem lands sold for less than the arrears of taxes due thereon, and thus avoid the effect of s. 161, subss. 2 and 3, which require an owner desiring to redeem lands sold for less than the taxes due to pay the full amount of arrears, as well as the expenses of sale and the additional ten per cent.

In *Smelting Company of Australia Limited v. Commissioners of Inland Revenue*, [1897] 1 Q.B. 175, Rigby L.J. at p. 182 points out that "The rule of construction which is called the *ejusdem generis* doctrine, or sometimes the doctrine '*noscitur a sociis*', is one which, I think, ought to be applied with great caution; because it implies a departure from the natural meaning of words, in order to give them a meaning which may or may not have been the intention of the Legislature." The rule accordingly is not to be applied invariably and it will not be applied if so to do will not best effect the object of the legislation considered as a whole: *Skinner and Company v. Shew and Company* (1892), 62 L.J. Ch. 196; *Re Ollmann*, 57 O.L.R. 340 at 342, [1925] 3 D.L.R. 1196.

The learned judge was of opinion that the object of the tax sale provisions of The Assessment Act was not alone the collection of taxes, but also the finding of new purchasers who would pay future taxes on the lands.

I have been unable to find any authority to support the view that the finding of new purchasers is an object of the legislation, and counsel for the respondent were unable to refer to any. On the other hand, in *Payne v. Goodyear et al.* (1867), 26 U.C. Q.B. 448, Draper C.J., delivering the judgment of the Court, said, at p. 451: "The primary, it may be said the sole, object of the

Legislature in authorizing the sale of land for arrears of taxes, was the collection of the taxes. The Statutes were not passed to take away lands from their legal owners, but to compel those owners who neglected to pay their taxes, and from whom payment could not be enforced by the other methods authorized, to pay by a sale of a sufficient portion of their lands."

The present Act does not require resort to any other means of collection as a prerequisite to a sale of lands for taxes, but any difference in this regard does not affect the object which the legislation has in view.

It is to be noted that in selling lands for taxes, the treasurer is directed to sell "so much of the land as is sufficient to discharge the taxes, and all lawful charges incurred in and about the sale and the collection of the taxes": s. 161(1), or "for any sum he can realize": s. 161(2), or he may sell to the municipality itself "for the amount due": s. 161(3), and there is nothing in the Act which permits the treasurer, in knocking down the lands, to have regard to the ability of the purchaser to pay subsequent taxes.

In my opinion, therefore, there is no ground for reading s. 177 in any sense that would restrict the means or the hands by which taxes may be paid, or as having in view as an object the taking of the lands away from their owners and putting them in the hands of others.

Further, it has been held that the *ejusdem generis* doctrine is not to be applied to general words following specific words, where the specific words embrace all objects of their class. To do so is to render the general words meaningless. In such a case the general words must have been intended to have a meaning different from the specific words: *Mason et al. v. United States* (1922), 260 U.S. 545 at 553-4.

It was argued on behalf of the respondent that such persons as mechanics' lien holders, judgment creditors and other incumbrancers were intended to have the right of redemption (s. 178 (4)) and were the sort of persons intended by the general words as they were not included within the earlier specific words.

However, it has been held in *Re Abbott and Medcalf* (1891), 20 O.R. 299, that the operation of an execution against an interest in lands is in effect that of an incumbrance *in invitum* and that the mortgagor, having the equity of redemption, may incumber that estate indirectly by suffering a judgment and execution

which would be *pro tanto* an assignment. It was also pointed out in that case that unless the context requires it the word "assign" is not to be read in a narrow or restricted meaning, citing *McBean v. Deane* (1885), 30 Ch. D. 520 at 531. By parity of reasoning a mechanics' lien created by s. 5(1) of The Mechanics' Lien Act, R.S.O. 1937, c. 200, is equally an incumbrance "*in invitum*" and "*pro tanto* an assignment". No difficulty arises in connection with a mortgagee. He is an assign: *McKibbon v. Williams* (1897), 24 O.A.R. 122.

On the other hand, a doweress is not an assign: *Re Martin and Merritt* (1901), 3 O.L.R. 284 at 289. I do not think it could have been the intention of the Legislature, in enacting s. 177, to refuse the right of redemption to a doweress. Unless, however, the words "any other person" are given a meaning more extended than that of the preceding specific words, such would be the result. In my opinion the specific words in the section exhaust the class of persons claiming through or under the owner, and the general words are therefore to be construed according to their ordinary meaning, as to do otherwise would render them meaningless.

As to the contention of the respondent, accepted by the learned judge, that to read the phrase "any other person" in s. 177 as meaning literally any person, would permit the owner of lands, in cases coming within subss. 2 and 3 of s. 161, by collusive arrangements with strangers, to redeem on terms other than are stipulated by those subsections, it may be that that is so. It may also be that such an arrangement is possible between an owner and an incumbrancer. Were such a course to be followed, however, the owner would incur the very serious risk of losing his lands should the facts ever come to light, as such an attempted redemption would not, by reason of the insufficiency of the amount paid, be a redemption at all. It is unlikely therefore that the possible collusive arrangements suggested by the respondent will be numerous. Indeed, such arrangements between owners and incumbrancers would seem to offer less prospect of exposure than an arrangement between an owner and one who has no interest in the lands. Whatever the possibilities in this regard may be, however, this contention of the respondent serves more to point to a possible deficiency in s. 161 than as a guide to the interpretation of s. 177. The Legislature has obviously used the word "owner" in s. 161, and the phrase "owner

. . . his heirs, executors, administrators or assigns" in s. 177, deliberately, and it would appear that the heirs, executors, administrators or assigns may be able to redeem on more favourable terms than may the owner himself. However that may be, no question has arisen in the case at bar as to the amount required to redeem.

In my opinion, therefore, Wood was a person entitled to redeem. He, of course, obtained no interest in the lands by redemption, the only effect of his payment being to place matters *in statu quo*: *Boulton v. Ruttan* (1832), 2 O.S. 396 (362B) at 402.

While the statute in question in *McDougall v. McMillan* (1875), 25 U.C.C.P. 75, did not contain the phrase "any other person", the view of Burton J. (as he then was) at pp. 88 and 89 is of interest.

As already mentioned, the proceeding here in question is a motion for a *mandamus* under the provisions of Rule 622, that is, for the issue of the high prerogative writ. Passing over the question as to whether the procedure here adopted is appropriate in view of the plaintiff having a cause of action under the provisions of s. 178(7) of The Assessment Act, as indicated in such cases as *Dawson v. The Town of Sault Ste. Marie et al.* (1909), 15 O.W.R. 230; *Poole v. Township of Bucke* (1923), 24 O.W.N. 163, affirmed 25 O.W.N. 358, and therefore not entitled to the high prerogative writ of *mandamus* (*Reg. v. London and North-Western Railway and Great Western Railway* (1896), 65 L.J. Q.B. 516), I think that in the circumstances of this case the discretion of the Court should be exercised against the respondent. This phase of the matter was not presented to the learned judge appealed from.

It appears that an agreement was entered into on 8th September 1937, between the Corporation of the Township of Emily, in which the lands in question lie, and the respondent. This agreement recites that the lands had not been assessed for some time, but that it was the intention of the municipality to assess the lands in future, that it was expected that the taxes would not be paid and that it would be necessary to sell the lands for taxes. The agreement provided that if the municipality became the owner by purchase at the tax sale the municipality would sell the lands to the respondent at a stated price, subject, however, to confirmation by the council for the time being. It also

provided that if the respondent should purchase the lands at the tax sale for less than the stated price he would pay the municipality the difference, and the respondent was to pay down a deposit on account of the purchase price on the execution of the agreement. According to the state of the title as disclosed by the Registry Office, the lands, 100 acres, had been patented in 1844 to one Mills and so remained, except with respect to some 9 acres, acquired by one Mahon by tax deed in 1855. After the agreement of 1937, and for the years 1938, 1939 and 1940, the whole of the lands were assessed in the name of Mahon notwithstanding that Mahon had no interest in any part of the lands except the 9 acres already referred to. The material does not disclose whether the lands were occupied or unoccupied and there is no reason to assume that notice of the assessment was sent or given to anyone. I do not know of any power on the part of the Township to enter into the agreement in question. The fact that it was entered into, and the course followed by the Township officials thereafter, indicate that what was in view was not the due assessment of lands under the provisions of The Assessment Act, but a means of enabling the respondent to acquire what he desired. In these circumstances, even assuming that the proceeding here in question was the proper proceeding, and I am of opinion that it was not, my view is that the discretion of the Court, which undoubtedly exists, should be exercised against the respondent, and the *mandamus* should be refused.

I would, therefore, allow the appeal with costs and dismiss the motion with costs.

Appeal allowed with costs and motion dismissed with costs.

*Solicitors for the applicant, respondent: Frost & Frost,
Toronto.*

*Solicitors for the appellants: McLaughlin, Fulton, Stinson &
Anderson, Lindsay.*

[COURT OF APPEAL.]

McPherson v. McPherson and Reynolds.

Divorce—Discretion of Court—Refusal of Cohabitation by Plaintiff Wife—Whether this Amounts to Desertion or Conduct Conducting to Husband's Adultery—Sufficiency of Evidence—Connivance—The Marriage and Divorce Act, R.S.C. 1927, c. 127, s. 5.

Desertion involves two elements on the part of the deserting spouse, the *factum* of separation and the *animus deserendi*; it also involves an absence of consent on the part of the deserted spouse. *Williams v. Williams*, [1939] P. 365, applied. There must be an "intentional disruption of the matrimonial consortium against the will of the other spouse". *Monckton v. Monckton*, [1942] P. 28 at 32, applied. A mere cessation of sexual intercourse, if there are good grounds for it, will not constitute desertion. *Davis v. Davis*, [1918] P. 85, applied. *Per Robertson C.J.O.*: It is not the law in Canada that the fact that a wife has refused to have sexual intercourse with her husband can be considered, standing alone, as conduct conducing to his adultery and disentitling her to a divorce. The law prevailing in Canada is as stated in *Latour v. Latour and Weston* (1861), 2 Sw. & Tr. 524, and *Synge v. Synge*, [1900] P. 180, affirmed [1901] P. 317, rather than in Lush on Husband and Wife, 4th ed., 1933, p. 32.

On appeal from the judgment of Laidlaw J.A., reported [1943] O.R. 713, held, Henderson J.A. dissenting, the evidence was insufficient to justify a finding of wilful desertion on the part of the plaintiff wife, or of conduct on her part conducing to the defendant's adultery, and she was not disentitled to relief on either ground, on the evidence in the record. Since, however, the evidence was lacking in many respects, there should be a new trial. (*Per Robertson C.J.O.*; Kellock J.A. would have given judgment for the plaintiff, but, in view of the difference of opinion in the Court, concurred in ordering a new trial.)

AN appeal by the plaintiff from the judgment of Laidlaw J.A., [1943] O.R. 713, [1943] 4 D.L.R. 381. The facts are fully stated in the reasons for judgment.

1st December 1943. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and KELLOCK JJ.A.

E. H. Dewart, for the plaintiff, appellant: There was no connivance here: 27 E. & E. Digest, p. 327, and cases there cited; *Rose v. Rose* (1932), 41 O.W.N. 124.

The wife's refusal of sexual intercourse is not an excuse for the husband to commit adultery: *Synge v. Synge*, [1900] P. 180, affirmed [1901] P. 317. The "refusal" here was not without reasonable excuse; intercourse was physically painful to the plaintiff.

As to the trial judge's discretion, see *Apted v. Apted and Bliss*, [1930] P. 246; *Rayden on Divorce*, 3rd ed., pp. 127-9; *Latour v. Latour and Weston* (1861), 2 Sw. & Tr. 524, 164 E.R. 1100; *Forster v. Forster* (1790), 1 Hag. Con. 144, 161 E.R. 504; *Glennie v. Glennie and Bowles* (1862), 32 L.J.P.M. & A. 17.

No one for the defendants, respondents.

Cur. adv. vult.

31st December 1943. ROBERTSON C.J.O.:—This is an appeal from the judgment of Laidlaw J.A. after the trial of the action before him at Toronto without a jury. The action was for divorce brought by the wife against her husband and a co-respondent. The action was undefended. The ground for divorce alleged was the adultery of the husband with the co-respondent. The learned trial judge found that adultery between the respondents had been proved as charged but he found that the appellant had deserted her husband before his offence. He also found that appellant was chargeable with conduct that conduced to the husband's adultery and, while not making a definite finding of connivance on her part, he expressed a view of her conduct that fell little short of it. Notwithstanding, therefore, the finding of adultery on the part of the husband, he dismissed the action.

Mr. Justice Laidlaw has done a public service in this and in one or two other divorce actions tried by him recently in refusing to decree a divorce on evidence lacking in respects that should be deemed essential. Jurisdiction in divorce was conferred upon the Supreme Court of Ontario so that a subject of great public importance should receive the careful attention and consideration that it merits. Counsel and solicitors who practice in such cases have, however, by careless methods and inadequate preparation done much to hinder the Court in the exercise of its jurisdiction in the way that it would desire. Not only is the public interest in this branch of the Court's jurisdiction caused to suffer, but there is danger also that injustice may at times be done to the litigants or to some of them. This may be such a case.

The only evidence upon which a finding of desertion on the part of the appellant could be made was her own, and while, as I shall hereafter more particularly set forth, that evidence was lacking in much that it was important to know, I am unable to find in it any proof of desertion by her.

In *Williams v. Williams*, [1939] P. 365, the Master of the Rolls said that "the act of desertion requires two elements on the side of the deserting spouse—namely the factum of separation and the animus deserendi; and on the side of the deserted spouse one element, namely, the absence of consent." Is there evidence of these three elements here?

The marriage was in October 1938. Husband and wife lived together, normally, in Toronto until sometime in August 1942,

when, the husband having enlisted in the Air Force, he was sent to Picton, the wife remaining in Toronto. It was his custom to come home for his leaves, which were in every third week, and this continued until some time in November. The appellant says that sexual intercourse with her husband was painful to her, and while it does not appear that she had ever denied him intercourse, she says that there were arguments in regard to her asking him to refrain. On the occasion of the husband's leave in November the appellant asked him if he would remain away rather than come home on his leaves because it was not very pleasant for her having him come home at night. She says this was because she suffered so on his leaves. The trial judge asked her "Did your husband put the question to you when you demanded that he leave the home—leave the home for how long?" to which her answer was "Well, actually when I asked him to leave home I meant for him to either leave home, or when he came home, he would desist from sexual intercourse for a period of time." The trial judge's question was not answered and there is nowhere in the evidence any statement of what the husband said in response to her request or demand. The evidence discloses only the fact that he did not thereafter come home when on leave.

The essential elements of desertion are not to be found here. So far as the husband is concerned, the proper inference from such evidence as there is on the record would be that he consented. A married man does not usually permit himself to be debarred from his home against his will so readily. If there was nothing more in the incident than appellant's request, the natural assumption from his actions would be that the husband was willing to remain away rather than accept the alternative that she proposed. This would be, however, a most unsatisfactory basis upon which to determine the question of desertion. There are far too many things undisclosed. The evidence does not disclose whether these people were living in a home provided and supported by the husband or whether it was the property of the wife. There is nothing to explain the immediate occasion of the wife's request. There is no evidence of any discussion of her request, nor of the husband's immediate reaction to it; whether he left immediately or later on the same day or on another day does not appear. Whether he removed his own belongings or whether he had in fact any belongings there; what, if anything,

was arranged in regard to the wife's future support; on leaving did they part in anger or as friends; did they correspond subsequently—none of these matters are touched upon and yet any of them would help in assessing the importance attached by the parties themselves to the event that had happened. Without more evidence than the record contains it is, in my opinion, impossible to say either that there was the *animus deserendi* on the part of the wife or the absence of consent on the part of the husband, both of which are essential elements of desertion by her.

Another matter of importance upon which the evidence might have been more satisfactory is the appellant's claim that sexual intercourse with her husband was painful to her. There may have been, in that and in her husband's disregard of it, good cause for her request. The learned trial judge has treated it as non-existent. I do not think it can be so regarded. There is no ground upon which her sworn statement of the fact can be ignored. No doubt medical evidence—particularly of a doctor who had examined the appellant before trouble arose, if any such evidence was available—would have been of assistance. Appellant's counsel desired to call some such witness after the case had been argued, but the trial judge, in the exercise of a discretion vested in him, declined to re-open the case for that purpose.

It is in evidence that at Christmas time—only a few weeks after he had ceased to come home for his leaves—the husband visited his wife in Toronto. It would have assisted to know how they met, and how they parted, and whether they discussed their own future relations. All that the evidence discloses, however, is that appellant told her husband of reports she had heard of attentions he was paying the co-respondent in this action, who was a former acquaintance of both of them, and was then at Picton, where the husband was stationed.

While I am unable, with every respect to the trial judge, to agree with him that there is evidence of desertion on the part of the wife that disentitles her to a divorce, I do not think it would be proper to make an order on this appeal granting a divorce. There is too much that is material that is not disclosed in the evidence. It may be that when all the facts that are relevant and material are disclosed the learned trial judge will prove to have been right in his finding of desertion. If the appell-

lant desires it I would order a new trial to enable her to put all the facts in evidence to enable the Court to do justice to her claim, and to allow it or to dismiss it on its merits. The action having been undefended no question of costs to the present time arises, except such as can be disposed of by the judge before whom a new trial is had.

It is necessary that I should say something in regard to the finding of conduct on the part of appellant conduced to her husband's adultery with the co-respondent. In my opinion that finding cannot be supported. I do not think it is the law that, in the discretion of any judge, the fact that a wife has refused her husband sexual intercourse can be considered, standing alone, as conduct conduced to adultery on his part disentitling the wife to a divorce. The true statement of the law on the matter—in any event as it prevails in Canada—is to be found in the two judgments cited by the learned trial judge—one in 1861 and the other in 1900—rather than in the more recent statement contained in the 1933 edition of a well known text-book.*

As to connivance, the evidence speaks for itself. Appellant, having heard continued reports of her husband's association with the co-respondent, had employed men to watch. On the night of 19th March 1943 the husband came to Toronto on one of his leaves in the company of the co-respondent. They were seen on the arrival of their train and were followed to an hotel, where the appellant, accompanied by her private investigators, found them in their room. In appellant's evidence she says: "They had started to unpack but they just had removed their top coats, that's all. I stood and looked at my husband. And I was rather surprised to see them together, in a position like that, because I didn't really think the reports I had received would reach to spending a week-end together. And I told him so. He turned around and said 'What do you expect when you won't let me come home?' So I said, 'I didn't think it would reach these proportions. I didn't think it would reach proportions like these.' He said 'Well, I intend to associate with Miss Reynolds and nothing you can do will stop me.' I asked him if he didn't think it would be better to conduct himself more gentlemanly than to put her in that position, and to put my name in such a way as

* The authorities referred to by the trial judge in this connection were *Latour v. Latour and Weston* (1861), 2 Sw. & Tr. 524, 164 E.R. 1100; *Synge v. Synge*, [1900] P. 180, affirmed [1901] P. 317; and *Lush on Husband and Wife*, 4th ed., 1933, p. 32.

he was doing. I also spoke to Miss Reynolds and she said actually she didn't mind, that is what she wanted, and she was going to go ahead seeing my husband as long as she wished to." Appellant says that she "was rather upset and just left."

The learned trial judge suggests that the appellant was apparently content to stand by and let matters take their course and that it may be argued that there was acquiescence on her part.

With respect, it seems to me impossible to say there was acquiescence on the part of appellant. There was strong protest and it was met with what can only be termed brazen defiance. In the circumstances I can see no ground for criticism of appellant's conduct on this occasion. It was not a single act of adultery that confronted her. An illicit relationship had been created between her husband and the co-respondent that nothing she could do would break.

I would therefore, if the appellant elects to have a new trial, allow the appeal and set aside the judgment appealed from and direct a new trial. If the appellant does not so elect, I would dismiss the appeal. In the event of a new trial, all costs, including costs of the appeal, should be in the discretion of the judge before whom the new trial is held.

HENDERSON J.A.:—An appeal from the judgment of Mr. Justice Laidlaw of 18th October 1943.

The correctness of the findings of fact of the learned trial judge is not questioned, and I think cannot be questioned. With the conclusions of the learned trial judge I entirely agree. I further agree that no general rules can be laid down in these cases.

I would dismiss the appeal. I suppose there should be no costs.

KELLOCK J.A.:—An appeal from the judgment of Laidlaw J.A. at trial, dated 18th October 1943, by which the action of the appellant wife for divorce was dismissed. The trial judge found that adultery on the part of the respondent had been established, but he exercised his discretion under The Marriage and Divorce Act, R.S.C. 1927, c. 127, s. 5 against the plaintiff on the ground that she had deserted her husband and had been guilty of conduct conduced to his adultery.

The evidence discloses that husband and wife had not been living together under the same roof continuously but that since August 1942 he had been in the Air Force, stationed at Picton, while she continued to live in Toronto. He came home on periodic leaves, and on one of these occasions, in November 1942, she asked him "if he would mind not to come home." The reason she gave the Court for this request was that intercourse with her husband was so painful that she could not stand it any longer. The parties had been married in 1938 and the incident of November 1942 had been preceded by considerable discussion on the subject.

In considering the question of desertion, it is necessary to find on the evidence an "intentional disruption of the matrimonial consortium against the will of the other spouse": per Henn Collins J. in *Monckton v. Monckton*, [1942] P. 28 at 32.

In *Davis v. Davis*, [1918] P. 85, Lord Coleridge J. points out that "There may be good grounds for partial cessation of intercourse in which the withdrawal of the husband or the wife would be a reasonable withdrawal. To justify separation there must be some deliberate, determined refusal such as to put an end to the idea of conjugal rights existing between the parties."

In the case at bar the appellant deposed:

"HIS LORDSHIP: (Q.) When you told your husband not to come back, did you mean that he should stay away indefinitely?
A. Well, I wanted to think things over as far as that situation was concerned. I had discussed it with him pretty much in full."

And a little later:

"Q. Were you taking the position that you wouldn't permit him to have intercourse with you? A. No, not definitely.

"Q. What was the situation? A. Well—

"Q. Did your husband put the question to you when you demanded that he leave home—leave the home for how long?
A. Well, actually, when I asked him to leave home, I meant for him either to leave home or when he came home he would desist from sexual intercourse *for a period of time*." (The italics are mine).

My brother Laidlaw was of opinion on this evidence that the appellant had determined to put an end to cohabitation and that is the basis of the judgment at trial, as I understand it. For myself, I have been unable to reach that conclusion. In my opinion, whatever might have been the ultimate outcome of the

matter, I do not think the appellant on the above evidence had reached any final determination, so as to bring the case within the authorities to which I have referred. In my opinion, therefore, the evidence fails to establish a case of desertion on the part of the appellant, and I do not think she is disentitled to a decree on that ground.

I am also of opinion, and I think it necessarily follows, that the conduct of the appellant does not amount to conduct conducing to the adultery of the respondent. The refusal here in question was not of the final and settled nature which in *Dixon v. Dixon* (1892), 67 L.T. 394, and *Plows v. Plows* (1928), 44 T.L.R. 263, was held to have been a conducting to the adultery of the husband. It is therefore not necessary to consider the apparent difference of opinion on this subject between the cases just mentioned on the one hand and *Synge v. Synge*, [1900] P. 180 at 207 (affirmed [1901] P. 317), and *Constantinidi v. Constantinidi and Lance*, [1903] P. 246 at 261, on the other. In my opinion, therefore, the case is not brought within the proviso to s. 5 of the statute in question.

Accordingly, were it not for the views of the other members of the Court, I would allow the appeal and direct a decree *nisi* in favour of the appellant, but in the circumstances I concur in directing a new trial.

New trial ordered, HENDERSON J.A. dissenting.

Solicitor for the plaintiff, appellant: E. H. Dewart, Toronto.

[COURT OF APPEAL.]

Aluminum Company of Canada Limited v. The City of Toronto.

Taxation—Municipal Income Assessment—Income Not Derived from Business for which Business Assessment Made—“Subsidiary” Companies—Questions of Law and Fact—The Assessment Act, R.S.O. 1937, c. 272, ss. 8, 9(1)(b).

The appellant company, which was engaged in the business of converting raw material into finished aluminum products, owned all the issued shares of four companies, two of which were incorporated under the laws of British Guiana, and two of which were Canadian companies. These companies were engaged in various steps in obtaining the ore, in British Guiana, and transporting it to the company's principal place of business at Arvida, Quebec. The appellant also owned 53½ per cent. of the issued shares of another Canadian company, which produced hydro-electric power, and from which the appellant obtained all the power necessary for its operations. This company, however, also supplied power to other customers. The appellant received substantial income from each of these five companies, in the form either of dividends or of interest on advances made by the appellant company.

Held, the income derived from the “subsidiary” companies was taxable under s. 9(1)(b) of The Assessment Act, R.S.O. 1937, c. 272, as “income not derived from the business in respect of which” the company was assessed, as a manufacturer, under s. 8. It was clear that, although the appellant, through the appointment of directors and otherwise, exercised a large measure of control over the other companies, and their operations were no doubt carried on in such a way as to facilitate the operations of the appellant, and mainly for its purposes, they were nevertheless separate entities, and each of them carried on its own business, from which its earnings were derived. The finding of fact of the Ontario Municipal Board in this respect was not appealable, and there was no error of law in the Board's construction of the Act.

AN appeal from the decision of the Ontario Municipal Board, [1943] O.W.N. 107, [1943] C.T.C. 114, increasing the appellant's income assessment. The facts are fully stated in the reasons for judgment.

8th, 9th, 10th November 1943. The appeal was heard by ROBERTSON C.J.O. and FISHER, HENDERSON, KELLOCK and LAIDLAW JJ.A.

Hon. S. A. Hayden, K.C., for the appellant: The question in this appeal is whether the income now in dispute is derived from the business in respect of which we are assessed under s. 8 of The Assessment Act, R.S.O. 1937, c. 272. The Ontario Municipal Board has approached the problem from the point of view of the subsidiary companies, and has said that since each of them has its own board of directors, and is a separate entity, each has a separate business. The proper approach is to ask whether the business of the parent company is such that the income from the subsidiary companies is in fact the income of the parent company. The whole operations of the parent com-

pany must be considered. [ROBERTSON C.J.O.: Do you contend that the Bauxite company, for example, is the agent of or a trustee for the parent company? Is the one company so subservient to the other that it could not dispose of its output independently of the other, or is the only relationship that of shareholder and company?] The Bauxite company was incorporated as the result of an agreement between the parent company and representatives of the Government of British Guiana, and although the leases were to the Bauxite company, they contain an express provision that the parent company shall construct a refinery in British territory.

This is in fact all the business of the parent company because of (1) the integration of operations, and (2) the effective control of the operations of all the subsidiaries. It is not necessary to establish an agency or trusteeship. Here there is a series of steps, and a person taking all these steps is carrying on the business of manufacturing aluminum. The test is not whether the directors of a subsidiary might set their wills against the control of the parent company, but whether the parent company has the control necessary to oust those directors if they adopt such a course.

"The business" in s. 9(1)(b) must be considered as a practical business operation. If there is actual control, actually exercised, by which adherence could be compelled, that is effective control and management.

We must consider the character of the income paid out of the profits of the individual businesses, when it comes into the hand of the parent company. The finding that this money, while it remains in the hands of the subsidiaries, is profits, is not conclusive. [ROBERTSON C.J.O.: The question is, what is the business carried on by the parent company?] [HENDERSON J.A.: You would read s. 9(1)(b) as importing the definition of income in s. 1(f).]

R. M. Fowler, for the appellant: The nature of the relationship between the appellant and the subsidiaries is a question of law: *The City of Toronto v. Rogers-Majestic Corporation Limited*, [1943] O.R. 1 at 11, [1943] 1 D.L.R. 127, [1942] C.T.C. 239.

J. Palmer Kent, K.C., for the respondent: The Municipal Board found (a) that the income in dispute was received by the appellant from the subsidiaries; (b) that these amounts

represented profits of the subsidiaries, earned from their individual businesses; and (c) that these profits, when paid over to the appellant, were not income derived from the business in respect of which the appellant is assessable under s. 8. These are findings of fact, and not appealable to this Court under s. 84(6): *Re The City of Toronto and The Famous Players Canadian Corporation Ltd.*, [1935] O.R. 314, [1935] 3 D.L.R. 327, affirmed [1936] S.C.R. 141, [1936] 2 D.L.R. 129; *Re International Metal Industries Ltd. and The City of Toronto*, [1940] O.R. 271, [1940] 3 D.L.R. 50; *Re Russell Industries Ltd. and The City of Toronto*, [1941] O.W.N. 147, [1941] 3 D.L.R. 361; *The City of Toronto v. Rogers-Majestic Corporation Limited*, [1943] O.R. 1, [1943] 1 D.L.R. 127, [1942] C.T.C. 239, affirmed [1943] S.C.R. 440, [1943] 3 D.L.R. 609, [1943] C.T.C. 216.

The appellant and its subsidiaries are separate and distinct entities, and each is distinct from the body of its shareholders. The business of each subsidiary is carried on by its directors, not its shareholders. The fact that one person or corporation owns all the stock does not make him or it the same person as the company: Masten and Fraser, *Company Law in Canada*, 4th ed., pp. 28-9; *Salomon v. A. Salomon and Company, Limited*, [1897] A.C. 22 at 31; *Re Hydro-Electric Power Commission of Ontario and Townships of Thorold and Pelham* (1924), 55 O.L.R. 431 at 435; *Pioneer Laundry & Dry Cleaners Ltd. v. The Minister of National Revenue*, [1939] S.C.R. 1, [1939] 1 D.L.R. 246, reversed [1940] A.C. 127, [1939] 4 D.L.R. 481, [1939] 3 W.W.R. 567; *Kodak, Limited v. Clark*, [1903] 1 K.B. 505 at 513; *Re City of Toronto and John Northway & Son Limited* (1923), 54 O.L.R. 81 at 83; the *Rogers-Majestic* case, *supra*, at 450 (S.C.R.).

Interest or dividends received by a company carrying on the business of a manufacturer are assessable. It is not part of the business of a manufacturer, for which he occupies lands, to hold bonds or shares of another corporation. Interest or dividends, therefore, are received as income not derived from the business in respect of which he occupies land, and in respect of which he is assessable under s. 8: *Re Massey-Harris Co. Limited and City of Toronto* (1919), 45 O.L.R. 353, 48 D.L.R. 321.

The thing which must be considered here is not the business of the appellant generally, but the nature of the business in respect of which it is assessed for business tax.

R. M. Fowler, in reply: S. 9(1)(b) requires the Court to decide the type of income that is to be taxed. The intention of this clause is to reach surplus income, but the action of the municipality here is an attempt to reach income earned throughout the world. The appellant of course pays income tax to the Dominion on this business. Both the *Northway* case, *supra*, and the *Rogers-Majestic* case, *supra*, are distinguishable. The onus is on the taxing authority to show that this income is within the statute.

16th December 1943. ROBERTSON C.J.O.:—This is an appeal from the order of the Ontario Municipal Board, dated 4th January 1943, whereby it allowed the appeal of the present respondent from the decision of Judge Parker, Judge of the County Court of the County of York, dated 20th November 1941, and ordered that the taxable income of the present appellant for the year 1940 be increased from \$9,127 to \$1,811,806. An alternative claim of the present respondent, that an additional amount of \$16,901,679 should be added to the taxable income of the appellant for the year 1940, was dismissed by the Board, and there has been no appeal by the municipality from the dismissal of that alternative claim.

The appellant is incorporated by letters patent issued under the Dominion Companies Act. Its nominal head office is at certain offices in the Canada Life Building on University Avenue, in Toronto. The appellant has also, in Toronto, manufacturing premises situated on Sterling Road. The latter premises are assessed to the appellant, and it is also assessed as a manufacturer, carrying on business as such on the Sterling Road premises, for a sum by way of business assessment, under s. 8 of The Assessment Act, R.S.O. 1937, c. 272.

The appellant made an income return, in which it disclosed total income of a sum in excess of \$15,000,000, and claimed exemption in respect of all of it but \$9,127.18. On being required to give certain particulars of the income in respect of which it claimed exemption, it gave a statement showing as income from "subsidiary companies" the following particulars:

"Demerara Bauxite Co. Limited	
Dividends	\$1,127,083.33
Interest on advances by Aluminum Co. of Canada Ltd. necessary for the business of its subsidiary	32,576.02

	\$1,159,659.35
"Saguenay Power Company Ltd.	
Dividend on common shares	\$ 506,430.00
"Saguenay Terminals Limited	
Dividend on common shares	\$ 112,500.00
Interest on money advanced by Aluminum Co. of Canada Ltd. which loans were essential for the successful carrying on of the business of the subsidiary	16,335.28

	\$ 128,835.28
"Sprostons Limited	
Dividend on preferred stock for the years 1921, 1922, 1923, 1924, 1925, 1926, 1927 and 1928..\$	97,556.26
"The Roberval & Saguenay Railway Company	
Interest on money advanced by Aluminum Co. of Canada Ltd. for the necessary operation of this subsidiary to cover the amount of which (\$1,330,000) bonds were issued by the subsidiary to Aluminum Co. of Canada Limited	\$ 93,100.00".

It is in respect of these items, totalling \$1,985,580.89, but reduced, by certain adjustments and deductions that are not disputed, to \$1,802,678.82, that the present appeal relates. Appellant, having been assessed for the income it had received from its "subsidiary companies", carried an appeal from that assessment to the County Judge, who allowed the appeal. The Ontario Municipal Board, on appeal by the municipality, restored the assessment. The question in dispute is whether the appellant is properly assessable for this income under s. 9(1) of The Assessment Act. S. 9 provides, in subs. 1, as follows:—

"9.—(1) Subject to the exemptions provided for in sections 4 and 8,—

"(a) every corporation not liable to business assessment under section 8 shall be assessed in respect of income;

"(b) every corporation although liable to business assessment under section 8 shall also be assessed in respect of any income not derived from the business in respect of which it is assessable under that section."

The neat question would appear to be whether the income of the appellant here in question is "income not derived from the business in respect of which it is assessable" under s. 8. In some of its aspects this is, no doubt, a question of fact, in respect of which an appeal does not lie to this Court under s. 84(6) of The Assessment Act: *Re The City of Toronto and The Famous Players Canadian Corporation Ltd.*, [1935] O.R. 314, [1935] 3 D.L.R. 327, affirmed [1936] S.C.R. 141, [1936] 2 D.L.R. 129. As presented in argument, however, the appeal would seem to involve also the question of the proper interpretation of s. 9 of The Assessment Act, and, therefore, to be one that this Court may entertain: *The City of Toronto v. Rogers-Majestic Corporation Limited*, [1943] O.R. 1, [1943] 1 D.L.R. 127, [1942] C.T.C. 239, affirmed [1943] S.C.R. 440, [1943] 3 D.L.R. 609, [1943] C.T.C. 216.

While it is not at all a determining circumstance, it should be stated that the operations carried on by appellant at its premises on Sterling Road in Toronto, are not by any means all the manufacturing operations, nor the only kind of manufacturing operations, carried on by the appellant in its own name and in every sense its business. At Sterling Road, appellant converts into sheet aluminum, aluminum foil and aluminum castings, material that is brought there in the form of aluminum ingots from appellant's works at Arvida, in the Province of Quebec. Appellant has, at Kingston, Ontario, a large manufacturing plant that carries on operations similar to those of the Sterling Road plant. A much greater part of appellant's business, carried on in its own name, and its business in every proper sense, is in the Province of Quebec. It is in the latter Province that appellant receives the bauxite from which its aluminum is developed, and it is there that the aluminum ingots are produced. It is estimated that 95 per cent. of this product is exported in that form, and that only 5 per cent. of it is sent on to the two Ontario plants for further fabrication. It is not disputed (so far as the present appeal is concerned) that, in

the interpretation of clause (b) of subs. 1 of s. 9, all of these manufacturing processes carried on by the appellant in Quebec, as well as in Ontario, come within the description of "the business in respect of which it is assessable" under s. 8, although only a minor part of the premises used in that business is within Ontario, and assessable there for business tax. That question was, no doubt, involved in the appeal to the Municipal Board, but was decided against the City, and there has been no appeal to this Court in regard to it, although it is a question about which there may well be difference of opinion.

To develop the question raised on this appeal, it will be necessary to give separately, as to each of the five "subsidiary companies" some description of them, and of the businesses that they respectively carry on. As to all of them, however, there is this in common, that appellant's income derived from them is in the form of dividends upon shares held by appellant in the subsidiary, or of interest upon money advanced by appellant to the subsidiary.

Demerara Bauxite Company Limited is much the largest contributor to appellant's income, of the five companies contributing. It is incorporated under the laws of British Guiana, and its head office is in the City of Georgetown, in British Guiana. This company holds in its own name, under lease, in the one case from the officer administering the Government of British Guiana in the name and on behalf of His Majesty the King, and in the other from the Commissioner of Lands and Mines of the Colony, certain lands in the County of Demerara on which there are deposits of bauxite. The lands in the first-mentioned lease are Crown lands, and the lands in the second are Colony lands. The terms of the leases appear to be identical, so far, at least, as the matters hereinafter referred to are concerned. The lease in each case is for 99 years, and is declared to be made for the purpose of taking bauxite from the lands. In addition to a small fixed rental of so much per acre, the company is required to pay a royalty for all bauxite taken from the property and exported from the colony. The leases require that at all times the lessee is to be and remain a British company, registered in Great Britain or a British colony, and having its principal place of business within His Majesty's Dominions, and that a majority of the company's directors shall be at all times British subjects. The lessee is restricted in assigning,

sub-letting or parting with possession of the demised lands without the consent of the Governor of the colony, and there are numerous provisions designed to assure the British character of the lessee, and that the output of the mine will be available in war, or other emergency, for the purposes directed by the Governor of the colony. The lessee further covenants as to the manner in which it will conduct its operations on the leased property. Failure to observe the terms of the lease may result in its termination by the Governor of the colony.

A further important provision of the leases is a covenant by the lessee, Demerara Bauxite Company Limited, that within seven years from the date of execution of the lease, the Northern Aluminum Company Limited (then the name of appellant), or some other company or firm approved by the Governor in writing, shall construct, in Great Britain or a British colony, a plant for refining bauxite into aluminum of sufficient capacity to produce 50,000 pounds daily of anhydrous alumina.

Demerara Bauxite Company Limited was formed pursuant to the terms of an agreement made between the Crown Agents for the Colonies in London, acting for and on behalf of the Government of the Colony of British Guiana, of the one part, and the appellant, the Republic Mining and Manufacturing Company, a corporation of the State of Georgia, the Merrimac Chemical Company, of Boston, Massachusetts, the Aluminum Company of America, of Pittsburgh, George Bain Mackenzie, of Little Rock, Arkansas, and Donald Fraser Campbell, of London, all of whom are included in the term "the Applicants", of the other part. This agreement provides for the applicants procuring the formation of a company registered in Great Britain or a British colony, with the object, amongst others, of the acceptance and fulfilment of the obligations of the lease as set out in the schedule to the agreement. The agreement, among other things, provides that the memorandum and articles of association of the said company shall provide that the company shall at all times be and remain a British company, registered in Great Britain or a British colony, and having its principal place of business within His Majesty's dominions, and that a majority of the directors of the company, including the chairman, shall be British subjects. The agreement then provides for the granting of a lease to the company to be formed, in the terms set out in the schedule. There are other provisions

in the agreement, but I think they are of no important significance for the present purpose.

The appellant is the holder of all the capital stock of the Demerara Bauxite Company Limited, with the possible exception of the directors' qualifying shares, in regard to which counsel for the appellant was not definitely instructed. Some of the directors of the Bauxite company are also members of the appellant's board of directors, but not a majority of them. The appellant exercises a large degree of supervision of the business and mining operations of the Bauxite company, and, in normal times, is the principal buyer of its output. During the war the Bauxite company has been under a good deal of government control as to the distribution of its output, and considerable quantities of it have gone, by direction of the Government, elsewhere than to appellant. For such bauxite as appellant has had, from the Bauxite company, during the war, as well as before it, appellant has been charged at what is termed "the world's market price". The dealings in this respect are carried out as between buyer and seller.

There is no information on the record before us to explain what, if any, arrangements or relations exist between appellant and the other applicants who joined with appellant in making the agreement for lease with the Crown Agents for the Colonies, nor does it appear to whom the aluminum ingots go, that appellant exports and that form 95 per cent. of its output of that material.

I have set forth in some detail this account of the formation of Demerara Bauxite Company Limited, and of the leases under which it operates, and of the relations it has with appellant, because it appears to me to be quite out of the question, in the light of all that I have set out, to regard the mining business carried on in British Guiana under the leases referred to, otherwise than as the business of the Demerara Bauxite Company Limited. Great care was taken, both in the agreement for the leases and in the leases themselves, to stipulate certain matters, with the intent on the part of the lessors of assuring that the leases should be made with, and be held by, a British company governed by directors, the majority of whom should be British. Demerara Bauxite Company Limited was formed to fit in with these stipulations, and to be a proper holder of the leases. Having been granted the leases in that character, it is bound

not to assign or sub-let, nor to part with possession of the lands demised, without consent of the Governor of the colony. To comply with the terms of the leases under which the mining lands are held and worked, it is essential that the identity and the character of the lessee in the particulars stipulated for, should be preserved. The Demerara Bauxite Company Limited must be the real holder of the lands under lease to it, and must itself carry on the mining operations. The appellant's contention that the mining business is really its business, if adopted, would avoid all these carefully made and stringent provisions by the simple device of its becoming the holder of the shares of the Bauxite company. In my opinion the stipulations of the agreement for lease, and of the leases themselves, are such that the Demerara Bauxite Company Limited, while it continues to be the lessee, cannot be other than the holder of the leases in its own right, and the operator of the mines and the owner of their output. Appellant may properly enjoy the substantial advantages of being the principal shareholder, and, in ordinary times, of being the chief purchaser of the output of the Bauxite company, but, under the terms of the leases on which the lands are held, and the bauxite is recovered from them, the Bauxite company, or its assigns, with the stipulated consent, must be the real holder of the leases, and it alone is entitled to carry on operations. This is of the essence of the undisputed evidence and exhibits upon which the judgment of the Board is based.

It will be convenient to deal next with Sprostons Limited.

The mining properties of the Demerara Bauxite Company Limited are on the Demerara River, some 75 miles from Georgetown, where the ore from the mines is loaded on ocean-going ships for transportation to a port on the St. Lawrence River, in Quebec.

Sprostons Limited is a company incorporated under the laws of British Guiana, and it held, even before appellant became concerned in it, a franchise for the river transportation necessary for appellant's purpose, and had also a short railway to other territory where it was believed that bauxite was to be found. The appellant had nothing to do with the incorporation of this company, but has bought in all its shares. The principal business of Sprostons Limited is the carrying of the bauxite from the mines to Georgetown, and, no doubt, the carrying of supplies to the mining camp. We are informed, however, by appellant's

counsel that Sprostons Limited is a common carrier, and if there are other goods for transportation, it will carry them, and will also carry passengers. As in the case of the mining company, appellant has a representative on the board of Sprostons Limited. The operations of Sprostons Limited are carried on under its own corporate powers and in its own name, and appellant is charged for any service it is given as others are.

Saugenay Terminals Limited is a Quebec company, which also was in existence before appellant had any connection with it. It had beach lots and under-water lots, on which a wharf had been erected. This was a convenient place at which to unload the bauxite that had been carried by ship from Georgetown in British Guiana on its way to appellant's refinery at Arvida, Quebec. The appellant now holds all the shares of this company, and has improved and enlarged its facilities for receiving the ore and putting it in railway cars for further transport. The appellant has certain of the members of its own board of directors on the board of this company, and pays for the service it is given.

Saguenay Terminals Limited also owns certain ocean-going ships which, with other ships that it has under charter, are employed in transporting bauxite from British Guiana to its wharves in Quebec.

The Roberval & Saguenay Railway Company was also an existing company, incorporated by statute in the Province of Quebec, before the appellant was interested in it. The appellant now holds all its issued shares. The company owns and operates about 25 miles of railway line. This company is also a common carrier, but mainly its business is the transportation of appellant's bauxite from the wharves of Saguenay Terminals Limited to Arvida, for which service appellant is charged as others are. Two members of appellant's board of directors are members of the board of this company. The construction or working of railways is expressly excepted from the powers of appellant under its letters patent.

The remaining subsidiary company is Saguenay Power Company Ltd., the second largest contributor to the income in question. This company develops hydro-electric power at points convenient for transmission to appellant's refinery at Arvida, Quebec. The appellant, however, owns only a little more than one-half of the issued capital stock of the Power company, and

the Power company has other customers to whom substantial quantities of electric power are supplied. The ability to obtain electric power in large quantities and at low cost is said to be the substantial reason for the location in Canada of appellant's works at Arvida. Nearly all of appellant's raw materials are imported, and 95 per cent. of its output is exported.

The appellant, no doubt, exercises a large measure of control over the manner in which the several other companies in question carry on their operations, and no doubt the operations of these other companies are carried on in a way to facilitate the operations of the appellant, and, mainly, for its purposes. In the case of at least some of the subsidiary companies, their operations are managed at the administration offices of the appellant in Montreal. The income, however, now in question, except in so far as it is in the nature of interest on advances made, or on moneys expended by the appellant for the subsidiary, comes in the way of dividends declared on the shares held by the appellant in the respective companies, and paid from their net earnings—dividends exactly such as the holder of one share would receive, in proportion.

I have, earlier in this judgment, stated certain facts that have particular reference to the case of the Demerara Bauxite Company Limited. In the case of each of the companies in question, however, there is, as in the case of that company, a separate corporate entity for the carrying on of its particular business. There is a board of directors in the case of each company, in whom is vested the management of the company's affairs. The properties of one kind and another held for the purposes of the business of each company are the property of that company. The revenues of each individual company, and the debts and obligations it incurs in its business, are the revenues and the debts and obligations of that individual company. Even in such business dealings as there are between the appellant and the other companies in question, including the advancing of money by appellant, the relations that are observed are such as are usual and proper between two separate and distinct persons or entities.

In my opinion, the Municipal Board was right in holding that the income in question is not, on any legitimate construction of s. 9 of The Assessment Act, income derived from the business of the appellant. It may be true, that, in a broad sense, the

operations of all these companies, beginning with the operations of the mining company, are directed to one end, that is, the production of aluminum from bauxite recovered from the properties leased to the Demerara Bauxite Company Limited, and that, therefore, the ownership of the shares, or of the controlling shares, of the several companies concerned, gave the appellant, at one stage or another of this whole enterprise, a large measure of control of the operations of all these companies, so that they are devoted to appellant's service, and, ultimately, it received, in the form of dividends, any profits that were earned.

In my opinion, all this is foreign to the construction of this taxing statute. As was said in a passage, often quoted, from the judgment of Lord Cairns in *Partington v. The Attorney-General* (1869), L.R. 4 H.L. 100 at p. 122:—

"I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

In *Tennant v. Smith*, [1892] A.C. 150 at p. 154, Lord Halsbury L.C. said, ". . . in a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes."

Clause (b) of subs. 1 of s. 9 of The Assessment Act says plainly enough that "the business" to which it refers is one in respect of which the corporation is assessable under s. 8. The persons who are assessable under s. 8 are the persons carrying on business as set forth in the several clauses of subs. 1 of s. 8. The section expressly recognizes that one person may carry on more than one kind of business (see subss. 3, 4, 5 and 12), and it makes provision for such cases. There is nothing whatever in the statute that warrants including in "the

business" that clause (b) of s. 9(1) refers to, a business in fact carried on by another corporation.

The Board has found that in each case the "subsidiary company" carries on the business from which the income is derived, as set forth in appellant's income return. In my opinion, that is a finding of fact, and it involved no question of law or construction of a statute, in respect of which the Board is in error. Neither do I think the Board is in error, either in law or in the construction of the statute, in concluding that the income that appellant received from these several subsidiary companies was not derived from the business in respect of which appellant was assessable under s. 8 of The Assessment Act. To place the construction for which appellant contends on the relevant sections of The Assessment Act would be to read into the statute words that it does not contain, and to impute to the Legislature an intention that it has not expressed, and that cannot fairly be implied from the terms of the statute.

The appeal should be dismissed, with costs.

FISHER, HENDERSON and KELLOCK JJ.A. agree with ROBERTSON C.J.O.

LAIDLAW J.A.:—This is an appeal by the Aluminum Company of Canada Limited from that part of an order of the Ontario Municipal Board, dated the 4th day of January 1943, whereby the taxable income of the Aluminum Company for the year 1940 is increased from \$9,127 to \$1,811,806.

The question to be decided is whether the appellant company is liable to assessment under s. 9(1) of The Assessment Act, R.S.O. 1937, c. 272, in respect of income received by it by way of dividends on shares of stock in certain other companies, and for interest on money advanced to such companies.

The income in question was received by the appellant company from Demerara Bauxite Company Limited, Sprostons Limited, Saguenay Terminals Limited, The Roberval & Saguenay Railway Company and Saguenay Power Company Ltd. The appellant company is the owner of all the issued shares in the companies named, excepting Saguenay Power Company Ltd., and is the owner of 53½ per cent. of the issued share capital of that company. One or more officers or directors of each of the companies is an officer or director of the Aluminum company.

It is necessary to examine the nature of the business of the appellant company, and of each of the companies controlled, through share ownership, by it.

The appellant company produces aluminum, in the form of crude metal ingots, at its plant at Arvida, Quebec. About 95 per cent. of the total output of such metal is sold by the appellant company in that form, and about 5 per cent. is used in two plants situate at Kingston and Toronto, Ontario, for making aluminum foil, castings and screw machine products. In my opinion, the business carried on at Arvida is not the same kind of business as is carried on by the Aluminum company at Kingston and Toronto. I think that for the purposes of The Assessment Act they must be considered as different classes of business of the same company. At Arvida the business is the treatment and refinement of aluminum ore (dried bauxite) by chemical process and electrolytic smelting. The article produced is crude metal, available to industry for conversion and fabrication into new articles of different name, character and use.

At Sterling Road in Toronto the appellant company re-melts the crude metal ingots received from the plant at Arvida, casts slabs, rolls sheets and, as stated by the president of the appellant company, the business there is "to change aluminum ingots into aluminum sheets, aluminum foil, aluminum castings and similar manufactured products." He describes the plant as "a straight manufacturing plant taking rough product and turning it into a finished product"

There is some doubt in my mind as to whether the business of producing the metal aluminum from the aluminum ore, bauxite, is the business of a manufacturer, within the meaning of The Assessment Act. But it is, of course, admitted that the business carried on at the plant of the appellant at Toronto, is the business of a manufacturer. Therefore, the appellant, occupying and using the land for the purpose of that business, is properly subject to business assessment, computed by reference to the assessed value of the land so occupied and used: The Assessment Act, *supra*, s. 8(1)(e).

But the income in question was not derived from the business in respect of which the appellant was assessable under s. 8 of The Assessment Act. Such income is, therefore, assessable by virtue of the provisions in s. 9, which reads as follows:—

"9.—(1) Subject to the exemptions provided for in sections 4 and 8,—

"(a) every corporation not liable to business assessment under section 8 shall be assessed in respect of income;

"(b) every corporation although liable to business assessment under section 8 shall also be assessed in respect of any income not derived from the business in respect of which it is assessable under that section."

There is no exemption in s. 4 or s. 8 properly applicable to this income.

The appellant argues that the business of each of the companies controlled by it is an integral part of the business of the Aluminum company; and that the income received from each and all of the companies is income derived from the business of the appellant. No doubt the ore mined by the Bauxite company, and the service furnished by the other companies, are necessary to the appellant, under present arrangements, for the production of aluminum. In the sense that the appellant must obtain raw material, transport it to the place where its mills are situate, and obtain electrical power to treat and refine it, each of the activities carried on by the respective companies is essential to the conduct of the business of the appellant. If such supply of material and service were not furnished by these particular companies, the appellant would be bound to arrange its business requirements in some other way. But the real question to be considered is whether or not the business of the appellant embraces, as component parts thereof, the business of each of the separate companies. To answer that question it is necessary to examine the nature and character of the business of each of such companies, and the relationship, if any, to the business of the appellant.

The Demerara Bauxite Company Limited mines the ore, moves it to a central point, where it is washed and dried to remove free moisture, and make it ready for shipment. Mr. Powell, one of the directors (and president of the appellant company) says, "It is a mining company." I agree. The company does not carry on the business of a manufacturer, and I think its business cannot be properly considered, for the purposes of The Assessment Act, as part of the business or undertaking of the appellant.

Sprostons Limited and The Roberval & Saguenay Railway Company are transportation companies, whose services are used by the appellant to move the ore from British Guiana to the appellant's mills at Arvida, Quebec. But that fact does not make the business of such companies the business of the appellant, nor can the business of the appellant rightly be said to have, as one of its constituent parts, the business of transportation carried on by either or both of these companies.

Saguenay Terminals Limited owns and operates terminal facilities, and also certain ocean-going ships. But likewise, the business of the appellant does not include the business of Saguenay Terminals Limited as a component part thereof.

Saguenay Power Company Ltd., as its name implies, is a company generating and selling hydro-electric power to the public, including the appellant. The final development of the project was no doubt due to activities and assistance of the appellant, but its business is a separate and distinct one from that of the appellant. The appellant is merely a purchaser, on favourable terms, of a large part of the power generated for sale.

The corporate relationship between the appellant and the various named companies may be briefly mentioned. Each company is a corporate entity, separate and distinct from the appellant company. All corporate rights and obligations of each company are independent, and unrelated to one another or to the appellant company. The corporate acts and policy of each company are controllable by the appellant through stock ownership, but the separate businesses and undertakings do not, in consequence, form one and the same business.

Finally, the Ontario Municipal Board, has found "that neither the facts nor the authorities cited support the . . . arguments . . . that the Aluminum Company of Canada Limited is carrying on a business embracing a chain of development of aluminum from the mine to the consumer. The company is the owner of all the shares in each link (or company) except one, but the shareholders do not carry on the business. Each link (or company) carries on the business." This finding is one of fact, supported by evidence, and without error. I agree with the finding and am not satisfied that there is any sufficient ground upon which it ought to be reversed by this Court: *Re The City of Toronto and The Famous Players Canadian Corporation Ltd.*, [1935]

O.R. 314, [1935] 3 D.L.R. 327, affirmed [1936] S.C.R. 141, [1936] 2 D.L.R. 129.

For the reasons given, I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

*Solicitors for the appellant: McCarthy & McCarthy, Toronto.
Solicitor for the respondent: W. G. Angus, Toronto.*

[ROSE C.J.H.C.]

[COURT OF APPEAL.]

Northern Ontario Power Company, Limited et al. v. Lake Shore Mines Limited.

Public Utilities—Contract for Supply of Electric Power—Construction—Statutory Limitation of Time—Contract to Make Contract in Future—The Public Utilities Acts, 1913 (Ont.), c. 41, ss. 23, 53, 58; R.S.O. 1927, c. 249, s. 22.

S. 22 of The Public Utilities Act, R.S.O. 1927, c. 249, applies to companies incorporated before the first enactment of the section (as applicable to power companies) by 1913, c. 41. Ss. 53 and 58 of the 1913 Act make this the clear result. A company may be considered as "incorporated for the purpose of supplying any public utility" if it is clear, from the description of its powers and objects in the letters patent, that this is the real purpose of its incorporation, even if the first of the objects enumerated is not connected with such purposes, but is a general power "to manufacture, buy, sell, and deal in goods, wares and merchandise of all kinds."

The effect of this section, as interpreted by the Court of Appeal and the Privy Council in *Northern Ontario Power Co. Ltd. v. La Roche Mines Ltd. et al.*, [1937] O.R. 824; [1938] 3 All E.R. 755, is to limit the contractual powers of a company to which the Act applies, so that it cannot validly enter into a contract which will extend for more than ten years. It follows that it cannot make a contract for the supply of power to commence at the termination of an existing contract, and run for ten years thereafter. To hold such a contract valid would be to enable a company to accomplish by two contracts what it was prohibited from doing by one.

P. Co. and the defendant, being already bound under a contract for the supply and acceptance of electric power, which contract, although expressed to be for the life of the defendant's mine, would expire, by force of the statute, on 1st May 1938, entered into an agreement, on 1st November 1929, for a "change-over" of equipment from 60-cycle to 25-cycle. This agreement contained a clause to the effect that the parties, on completion of the change-over, would "enter into a new electrical contract similar in form and agreement with the present existing contract", for the same total amount of power, but all of 25-cycle, instead of, as formerly, partly 60-cycle. The change-over was completed on 15th June 1932, but no new express contract was entered into or discussed at that time, although power continued to be supplied and paid for until April 1940, at which time the defendant ceased to accept power from P. Co.

Held, the defendant was under no obligation, in April 1940, to continue to take power only from P. Co. Although the 1929 contract was in

form only an agreement to make a contract, it was nevertheless itself a contract for the supply of power, and created a binding obligation the instant it was made. *Hillas and Co. Limited v. Arcos Limited* (1932), 147 L.T. 503 at 515, applied. It could not be successfully argued that it was a contract which took effect only at the completion of the change-over, and ran for ten years from that date (*i.e.*, until 15th June 1942). Bearing in mind that it was an essential part of the arrangements that power should continue to be supplied until completion of the change-over, P. Co.'s contracting powers, when making the 1929 contract, were restricted to such a period as, when added to the period for which power was to be supplied during the change-over, would make the full period of ten years from 1st November 1929. It was therefore not necessary to decide when the supply of power began under the 1929 contract, since in any event the obligations of the parties under that contract ceased on 1st November 1939. Rose C.J.H.C., at the trial, was of the opinion that it was permissible for the parties to make a contract, in November 1929, to commence only at the completion of the change-over, and that such a contract could validly run for ten years from its commencement, but he held on the facts that that was not the contract made in 1929, and that power continued to be supplied throughout under the 1928 contract. The majority of the Court of Appeal were of opinion, for the reasons set out above, that the trial judge was wrong in the first respect, and therefore found it unnecessary to deal with the second branch of his holding, reaching the same result on a different ground. Laidlaw, J.A., dissenting, was of opinion that the contract of 1929 did not commence until the completion of the change-over, that such an agreement was valid and binding, and that consequently P. Co. was entitled to damages for breach of contract.

Held, further, by the trial judge (affirmed in this respect by the majority of the Court of Appeal), there could not be implied, from the conduct of the parties after completion of the change-over in 1932, a new contract in accordance with the agreement of 1929, to run for ten years. All that the 1929 agreement seemed to contemplate was the execution of a new formal contract, not the negotiation of a new agreement, and the reasonable inference from the conduct of the parties was that they were content to proceed with nothing further in this connection than they already had. Further, there could not be implied, from conduct after 1st May 1938 (when the 1928 contract would have terminated), the formation of a new contract for ten years from that date.

Held, further, by the trial judge, P. Co. was entitled to be paid, at the rates provided for in the contract, and with interest as therein provided, for the power used by it between October 1939 and the termination of the relationship in April 1940. (There was no appeal against this part of the judgment at trial.)

Contracts—Implied Contracts—Distinction between Implying Term in Formal Executed Contract and Implying Existence of Contractual Relationship from Conduct of Parties.

Quaere, whether the rules laid down in such cases as *Luxor (Eastbourne), Limited et al. v. Cooper*, [1941] A.C. 108, as to implying terms in a contract, are applicable where it is sought to imply an entire contract from the conduct and dealings of the parties. Where the parties have set out the express terms of their contract, it requires "the compulsion of some necessity" to imply a term not expressed, but where there is no express contract, and the existence of a contractual relationship is evidenced only by the conduct of the parties, what the Court must do is to place a reasonable construction upon that conduct, and, if the evidence will justify it, to make reasonable implications from it.

AN action for an injunction, damages, and other relief. The facts, and the relief sought, are fully stated in the reasons for judgment.

16th and 17th January and 13th, 14th, 17th, 18th and 19th February 1941. The action was tried by ROSE C.J.H.C. without a jury at Toronto.

W. N. Tilley, K.C., and Hon. W. A. Gordon, K.C., for the plaintiffs.

A. G. Slaght, K.C., and R. I. Ferguson, K.C., for the defendant.

13th April 1943. ROSE C.J.H.C.:—The principal question in this case is whether, on April 30, 1940, the defendants were bound to the plaintiffs or either of them, and if so for how long, to abstain from using in the defendants' mines, without the written consent of the plaintiff Northern Ontario Power Company, Limited, any system of electricity other than that furnished by the Power Company, provided the Power Company was able and ready to supply the same.

The plaintiff Northern Ontario Power Company, Limited (hereinafter sometimes referred to as the Power Company) is an Ontario corporation formed by letters patent dated December 20, 1928, which letters patent gave effect to an agreement for amalgamation of two previously existing Ontario companies—Northern Ontario Light and Power Company, Limited, incorporated by letters patent of February 23, 1911 (hereinafter sometimes referred to as the Light and Power Company), and Northern Canada Power, Limited, incorporated by letters patent dated November 5, 1919. The Plaintiff Canada Northern Power Corporation, Limited, is a Dominion company, incorporated by letters patent dated December 9, 1924. The Ontario companies are described as subsidiaries of the Dominion corporation.

The Light and Power Company and the defendants entered into an agreement dated July 30, 1917, for the supply to the defendants during the life of their mines of all electric current required for the operation of not more than 600 h.p. in equipment, the defendants agreeing to accept the current at the prices and subject to the terms and conditions of the agreement. That agreement was replaced by a revised contract between the Light and Power Company and the defendants dated May 1, 1928, for the supply "for the mining life of the properties now or hereafter operated or owned or controlled by the" defendants in the Kirkland Lake district of 6,000 h.p. of 60-cycle power, and 6,000 h.p. of 25-cycle power, subject to increase if agreed upon. The plain-

tiff the Dominion Corporation intervened "to guarantee the performance of this contract by Northern Ontario Light and Power Company, Limited". Some of the terms of this contract of 1928 (Ex. 7) will be stated more particularly later on.

In 1929 the plaintiff Power Company (the amalgamated company) which theretofore had been supplying power under the agreement of 1928, was desirous of ceasing to develop 60-cycle power, and an agreement (Ex. 9) was entered into between it and the defendants, dated November 1, 1929, which, after reciting that the Power Company was supplying the defendants with electrical power at the defendants' mine at Kirkland Lake, and that the defendants had agreed to permit the Power Company to change over all existing 60-cycle electric equipment installed or used on the defendants' mining property to 25-cycle electrical equipment, the change-over to be effected gradually to suit the convenience of the defendants but without undue delay by either party, went on to witness an agreement (1) that the Power Company should be permitted to change over all the existing 60-cycle electrical equipment to 25-cycle electrical equipment; (2) that the change-over should be effected gradually and to suit the convenience of the defendants but without undue delay by either party; (3) that the transformers and equipment should be maintained by the Power Company for the sole use of the defendants, provided, however, that if the requirements of the defendants in the future should diminish so that smaller transformer equipment would adequately take care of their requirements, the Power Company should have the right to install such smaller equipment; (4) that a certain spare transformer should be installed by the Power Company at such time as the defendants might deem the same necessary as a guarantee against power interruption due to transformer trouble; (5) that the Power Company should replace, free of cost to the defendants, all the defendants' existing 60-cycle equipment with 25-cycle equipment, but that in the event of the defendants requiring equipment of a larger or smaller capacity to take the place of the equipment "presently" installed the higher or lower cost of the same should be adjusted between the parties; (6) that the existing 60-cycle equipment then on the defendants' property, including spares which should have been replaced, when satisfactorily replaced with 25-cycle equipment, should become the property of the Power Company; (7) that the replacement of

the equipment should be so arranged that interference with the operation of the plant should be reduced to a minimum; (8) that during the period of change the defendants might, if they deemed it necessary, make certain changes in speed or other characteristics of their existing equipment; (9) that the Power Company should supply without charge a certain transformer which should remain its property but should be for the sole use of the defendants until such time as their load did not require it; (10) that should the change from 60-cycle to 25-cycle not produce the required speed for direct connection or belt drive to certain apparatus the Power Company should bear the expense of providing such mechanical devices as might be required to produce such satisfactory speed; (11) that "it is further understood and agreed between the parties hereto, that upon the completion of the change-over from 60 to 25 cycle equipment covered by this contract, the Customer [*i.e.*, the defendants] shall enter into a new electrical contract similar in form and agreement with the present existing contract between the parties hereto, dated the 1st day of May, 1928, but such new contract shall provide for a total supply by the Company to the Customer of 12,000 horse power 25 cycle power supply."

The "change over" was not completed until June 15, 1932. Thereafter no new electrical contract was entered into pursuant to clause 11 of the agreement, or even discussed, but the Power Company continued to supply power and to render bills monthly upon the basis established by the agreement of 1928, and the defendants paid the bills in the ordinary course of business until February, 1939, when a question arose as to whether the Power Company in making up the bills had complied with clause 15 of the contract of 1928, which reads: "In case the price for similar service and equal or smaller amounts of power to that used by Consumer be reduced by the Company or any other Company controlled by the Canada Northern Power Corporation Limited to a price below that which Consumer is paying for service, then the Consumer shall be given the benefit of such reduced price." The bill dated February 1, 1939, for current supplied during the month of January was paid in full by a cheque marked "Paid under protest", and later bills, including one dated October 3, 1939, for current supplied during the month of September, were paid by cheques similarly marked. Thereafter the monthly bills beginning with that dated November 1, 1939, and ending with

that dated May 1, 1940, were not paid in full, but the defendants in each month sent to the Power Company a statement showing the amount that according to the defendants' construction of the contract ought to have been charged for the preceding month, and with each of these statements sent a cheque for the amount due according to their computation. On April 30, 1940, the defendants ceased to use power supplied by the Power Company and since that time have been obtaining their supply of power from The Hydro-Electric Power Commission of Ontario under an agreement which had been made between them and the Commission dated February 21, 1940.

The difference of opinion as to the effect of clause 15 of the agreement of May 1, 1928, stated very shortly, was this: The agreement established rates per month (1) for each h.p. of the first 5,000 h.p. taken; (2) for each h.p. of the next 5,000 h.p. taken; (3) for each h.p. of the next 5,000 h.p. taken, and (4) for each h.p. of the next 5,000 h.p. taken, the rate for each "block" of power being lower than the rate for the preceding block. In 1929 and afterwards the Power Company from time to time published revised schedules of rates to be paid by mining companies. The earliest of these to which reference has been made was communicated to the defendants in a letter dated November 2, 1934. Another became effective on January 1, 1937, another on January 1, 1938, and another on January 1, 1939. This last established a rate per month for each h.p. of the first 8,000 h.p.; a lower rate for each h.p. of the next 3,000 h.p., and a still lower rate for each h.p. of the next 9,000 h.p. The rate for each h.p. of the first 8,000 h.p. was lower than the contract rate for each h.p. of the first 5,000 h.p. but greater than the contract rate for each h.p. of the second 5,000 h.p.; and the defendants' contention was in effect that, while they were entitled to have the first 5,000 h.p. of their requirements at the rate established by the new schedule of rates, it was not open to the Power Company to charge them for the next 3,000 h.p. at a rate exceeding the contract rate for the second 5,000 h.p. On October 16, 1939, Roach J., in *Hollinger Consolidated Gold Mines Ltd. v. Northern Ontario Power Company Ltd.*, [1939] O.W.N. 529 (the full text of his judgment is in Ex. 16) gave to a similar clause in the Power Company's contract with Hollinger Consolidated Gold Mines Ltd. the reading for which the defendants in this case were contending, but on February 1, 1940, the Court of Appeal

([1940] O.W.N. 66, [1940] 1 D.L.R. 516 and Ex. 16) found that Roach J.'s reading was incorrect and that the clause had the effect contended for by the Power Company. This judgment of the Court of Appeal was affirmed by the Supreme Court of Canada on June 29, 1940: [1940] 3 D.L.R. 659. The result of those judgments of the Court of Appeal and the Supreme Court of Canada is that the bills rendered by the Power Company and disputed by the defendants ought to be held to be correct—as assuming, of course, that clause 15 of the revised contract of 1928 governs.

Another important fact that must be stated before the several contentions as to the relationship that existed between the Power Company and the defendants on April 30, 1940, is discussed, is that on July 20, 1937, in *Northern Ontario Power Co. Ltd. v. La Roche Mines Ltd. et al.*, [1937] O.R. 824, [1937] 4 D.L.R. 47, the Court of Appeal found that s. 22 of The Public Utilities Act, R.S.O. 1927, c. 249, which reads: "The corporation may, from time to time, and upon such terms as may be deemed advisable, enter into contracts for the supply of a public utility to any person for any period not exceeding ten years," was applicable to Northern Ontario Power Company, Limited, and that consequently a contract which contained, under the heading "Special Conditions," this provision: "Period of contract: This agreement when executed shall extend for the mining life of the properties now or hereafter operated or owned or controlled by the consumer in the Porcupine District" (which is exactly the same as the corresponding provision in the agreement of 1928 except that in the agreement of 1928 the last four words are "the Kirkland Lake district") was effective only for ten years. This holding of the Court of Appeal was affirmed by the Judicial Committee of the Privy Council on July 27, 1938: [1938] 3 All E.R. 755, [1938] 3 D.L.R. 657, [1938] 3 W.W.R. 252. See p. 760, where Lord Russell of Killowen says that their Lordships "agree with the view expressed by the Court of Appeal, and with the grounds upon which that view is based, and they are of opinion, . . . that the contract, and with it the obligation, would come to an end with the expiration of 10 years from the date of the contract. They see no reason for holding either that the capacity of the Power Company to contract for the supply of a public utility is not by the sections restricted to a period not exceeding 10 years, or that a contract which purports to, or which may on its terms,

extend beyond that period is not valid and binding during the period."

It was suggested on behalf of the plaintiffs that the contract of 1928 was not affected by s. 22 of R.S.O. 1927, c. 249, inasmuch as the contractor, the Light and Power Company, had been incorporated in 1911, that is to say, before s. 22 (or its predecessor) had been made applicable to companies supplying electrical power or energy. It was said that the Light and Power Company had ample power under its letters patent of incorporation to contract for the life of the mines, and that the restriction to contracting for not more than ten years, which had been held to be imposed by the statute in the case of the Power Company (incorporated in December 1928), could not be found to have been imposed in the case of the Light and Power Company, and that the Power Company, having by the amalgamation succeeded to all the rights and obligations of the Light and Power Company, was entitled to enforce after May 1, 1938, all the rights given to the Light and Power Company by the agreement. A somewhat similar suggestion had been made by counsel in the *La Roche* case, but the Court of Appeal apparently found it unnecessary to deal with it explicitly, for the reason that the contract in the *La Roche* case was made by the Power Company and that, the Power Company having been incorporated after s. 22 was made applicable to power companies, its charter was "taken subject to the provisions of" the section. But, although it may be said that the point as to the applicability of the section in the case of the Light and Power Company was not expressly decided either in the Court of Appeal or in the Privy Council, my opinion is that the section is so applicable. The importance of the judgments of the Court of Appeal and the Privy Council lies, I think, in the holding that the section when applicable is restrictive in the case of a company whose charter gives it power to contract and does not in terms limit the length of the period for which it may contract.

A section like s. 22 of the Act discussed in the *La Roche* case was by c. 91 of the statutes of 1910 inserted in The Municipal Light and Heat Act (R.S.O. 1897, c. 234), which was a statute to authorize cities, towns, and villages to provide gas and other means of lighting and heating, but this Act, of course, did not apply to companies such as the Light and Power Company or the Power Company. In 1913 The Public Utilities Act was passed

(1913 c. 41). "Public Utilities" in Part V of that Act meant "water, artificial or natural gas, electrical power or energy, steam and hot water." By s. 53, Part V was made to apply to "every company *heretofore or hereafter* incorporated for the purpose of supplying any public utility." By s. 58 (which is found in Part V), a number of sections not found in Part V "shall, *mutatis mutandis* apply to a company." Amongst these sections is s. 23, which reads: "The corporation may from time to time, and upon such terms as may be deemed advisable, enter into contracts for the supply of a public utility to any person for any period not exceeding ten years." So that if the Light and Power Company is a company incorporated for the purpose of supplying any public utility, the section that has been held to be restrictive in the case of the Power Company applied to the Light and Power Company. The Public Utilities Act that was under consideration in the *La Roche* case (R.S.O. 1927, c. 249) was, in the respect that has been mentioned, the same as the Act of 1913: "public utility" bore the same meaning; Part V applied as in the Act of 1913; and by s. 59, s. 22 (s. 23 of the Act of 1913) was made to apply to a company. The question then as to the applicability of s. 22 to the Light and Power Company seems to be limited to the inquiry as to whether that company was a company "incorporated for the purpose of supplying any public utility." Certainly it was by its letters patent created "a Corporation for the purposes and objects following, that is to say: . . . (b) To manufacture, generate or obtain by purchase or other legal title, gas, compressed air, steam, electricity, and all other kinds of power and to sell, dispose of, distribute and deal in the same." But the first named of the purposes and objects was "(a) To manufacture, buy, sell and deal in goods, wares and merchandise of all kinds"; and the suggestion is that, because this power "(a)" was the first of the purposes and objects stated, the company ought to be deemed to be primarily a general trading company with an incidental power of supplying public utilities, rather than a company incorporated "for the purpose of supplying any public utility" within the meaning of Part V of the Act. My opinion is that this suggestion ought not to be adopted. Some of the purposes and objects stated such as "(c) To acquire . . . water powers and other powers for the production of electricity, pneumatic, hydraulic or other power or force . . . and to utilize and develop the same", and "(g) To

acquire . . . hold and dispose of capital stock in any company using gas, electricity, compressed air or steam for motive power", seem to indicate that the supply of public utilities was the purpose and object most prominently in the minds of the incorporators, and that the power to manufacture, buy, sell and deal in goods, wares and merchandise was the incidental power. The last mentioned power was one that used to be (perhaps still is) commonly applied for in connection with the incorporation of companies, as something that might be useful for the purpose of setting at rest any doubt as to the power of the company to perform acts and make contracts which, while useful in the carrying out of the real purpose and object of the incorporation, might not be held to be included in the incidental powers which by the Ontario Companies Act are conferred upon all companies incorporated under it; and I think that the mere fact that this power as to goods, wares and merchandise is by the letters patent placed at the head of the list of the purposes and objects of incorporation does not militate against the describing of the Light and Power Company as a company incorporated for purpose "(b)". Therefore, I think that s. 22 of R.S.O. 1927, c. 249, was applicable to the Light and Power Company on May 1, 1928, when the revised contract was entered into, and, consequently, that the term of that contract was not for the mining life of the properties but for ten years.

As has been stated already, Canada Northern Power Corporation, Limited (the Dominion company) "intervened" in the contract of 1928 to guarantee performance by the Light and Power Company. But in the contract no obligation of the defendants to the guarantor is expressed, and, indeed, there is no reference to the Dominion company except in clause 15, which entitles the defendants to the benefit of certain price reductions that may be made by the Light and Power Company "or any other company controlled by the Canada Northern Power Corporation, Limited." I am unable, therefore, to see what right the Power Corporation has against the defendants to enforce the contract, or how the case is affected by the fact that the Ontario Public Utilities Act does not apply to the Dominion company. The suggestion by counsel was that while the Light and Power Company might have been incapable of binding itself for more than ten years, it was perfectly capable of supplying power for the life of the mine; that as the Ontario statute did

not affect the Power Corporation, nothing stood in the way of a guarantee by the Power Corporation that the Light and Power Company would supply power during the mining life of the properties; that it did in fact so guarantee; that the consideration for the guaranteee was the undertaking of the defendants to take their supply of power from the Light and Power Company and from no one else; and that the Power Corporation was, therefore, in a position to insist upon the fulfilment of that undertaking. No cases supporting this suggestion were cited by counsel, and I am, as has been stated, of opinion that the undertaking being on its face with the Light and Power Company and not with the Power Corporation, the Power Corporation did not obtain the right to enforce it. It is to be noted that there is no evidence that the defendants requested the Power Corporation to guarantee performance by the Light and Power Company. All that we have is the description of the Light and Power Company in clause 5 as a company controlled by the Power Corporation, and the execution by the corporation of the printed note that it intervenes to guarantee performance by the Light and Power Company, the document being a printed document, and that the note of the Power Corporation's guarantee is part of the print and is placed after the signatures of the contracting parties.

Apart from the question as to whether, notwithstanding s. 22 of the statute, the contract could be treated as a valid and enforceable contract for the mining life of the properties, there were several suggestions by counsel as to the true position of the Power Company and the defendants after May 1, 1938.

The plaintiff's suggestions were (1) that after May 1, 1938, the contract of 1928 was by tacit agreement renewed for the mining life of the properties (*i.e.*, by the force of the statute, until May 1, 1948), (2) that the agreement of 1929 established a ten-year term beginning on the completion of the "change over" on June 15, 1932, and running until June 15, 1942, and (3), as an alternative to (2), that by their actions after June 15, 1932, the parties tacitly entered into a contract running for the mining life of the properties (*i.e.* (by statute) until June 15, 1942). On the other side it was contended that the change-over contract gave a new starting point to the term, which term was by contract a term for the mining life of the properties reduced by the statute to a term expiring on November 1, 1939. It was said

that the agreement of 1929 was in effect an agreement to supply and take power for the mining life of the properties—pending the completion of the change on the terms of the contract of 1928, and thereafter upon the terms of a new electrical contract for a total supply of 12,000 h.p. of 25-cycle power, which contract should be similar in form and agreement to the contract of 1928. But it was said that because of the statute the contract of 1929 could not bind the parties for a term of ten years commencing after the completion of the change but only for a term of ten years commencing on November 1, 1929.

In connection with the contention that tacitly the parties in 1938 renewed the contract of 1928 for another mining-life-of-the-properties term, some facts that have been mentioned quite generally must be stated with greater particularity.

The contract of 1928 is in form an authorization and request by the defendants to the Light and Power Company (in the contract called "the Company") to connect its electrical system with the wiring of the defendants (called "the Consumer") at a point described, and to cause electric power and energy to be there delivered during the period noted, or any renewal or continuation thereof, "as provided and at the rate specified". This authorization and request is followed by a number of "General Conditions". The first of these notes the agreement of the consumer to make payment at regular monthly intervals as required by the company and at the rate and on the basis thereafter stated. The accounts are to be subject to the discount for prompt payment thereafter stated if paid within fifteen days, and to interest at the rate of 7 per cent. per annum from sixty days after their date if not paid within that period. Condition 2 is that the consumer will provide all lines and electrical equipment (except meters) on the property for connecting the consumer's electrical equipment with the point of delivery, and will maintain the same in efficient condition according to the relevant rules and regulations; that when it is necessary to place transforming apparatus on the consumer's premises for the consumer's service the latter will provide the land, and that the company shall have the right to supply service to other consumers from the transformer house; that the operation of the consumer's electrical apparatus shall be carried on in a manner which will not introduce any undue disturbing element into the electrical system of the company; and there are other ancillary provisions. Con-

dition 3 relates to metering equipment. Condition 5 fixes responsibility for the care of all apparatus of the company on the consumer's property and for damage to such apparatus by fire, etc., and witnesses an agreement that all meters, wires, poles, and other apparatus or equipment installed by the company upon the consumer's premises shall remain the property of the company. Condition 6 is (*inter alia*) that during the continuance of the contract no system of electricity other than that furnished by the company shall be used in said premises "providing Company is able and ready to supply same, except with the written consent of the Company"; and there is a provision for the consumer obtaining additional power from other sources if the company is not able and ready to supply it. Condition 10 relates to freedom of the company from liability for damage caused by high-tension electric current, etc. Condition 11 reserves to the company the right to discontinue its service on certain defaults in payment or violation by the consumer of conditions of the contract, etc. Condition 12 provides (*inter alia*) that "the readiness of the Company to deliver the said power or energy as evidenced by maintenance of normal voltage and frequency . . . at the point of delivery shall constitute a valid tender of the same." Condition 13 makes the benefits and obligations of the contract inure to and be binding upon the successors, etc., of the original parties, but the contract is not to be assignable by the consumer without the written consent of the company, which consent shall not unreasonably be withheld. Condition 14 relates to the settlement of disputes by arbitration. It may be noted here that at the trial counsel for the defendants moved to stay the action in order that this provision for arbitration might be resorted to, but that for reasons that were then given it was held that the action was maintainable. Condition 15 is the price-reduction provision that has been quoted.

Following the general conditions are "Special Conditions" which give (1) the location of the consumer's property, (2) the point of delivery, (3) the nature of the supply (partly 60-cycle and partly 25-cycle power), (4) the period of the contract ("This agreement when executed shall extend for the mining life of the properties now or hereafter operated or controlled by the consumer in the Kirkland Lake district"), (5) the amount of power covered by the agreement (6,000 h.p. of 60-cycle power subject to increase if the Company agrees in writing to supply

the same, and 6,000 h.p. of 25-cycle power with the same provision for increase), (6) "PRICE

\$4.63 per H.P. per month for each of the first 5,000 H.P.

\$2.78 per H.P. per month for each of the next 5,000 H.P.

\$1.85 per H.P. per month for each of the next 5,000 H.P.

\$1.39 per H.P. per month for each of the next 5,000 H.P.

Contract limited to 20,000 H.P.; all less ten per cent. for prompt payment," (7) hours of service, method of measurement, etc.

The judgment of the Court of Appeal, in the *La Roche* case was, as has been stated, pronounced on July 20, 1937, *i.e.*, some nine months before the expiration of ten years from the date of the revised contract, and the judgment of the Privy Council was delivered on July 27, 1938, *i.e.*, something less than two months after that expiration. The officers of the plaintiff companies must have known of the judgments almost as soon as they were pronounced, and it is a fair assumption that the defendants' officers were aware of the fact that the judgments had been given; but there is no evidence as to whether either the plaintiffs or the defendants appreciated the bearing of the decisions upon the question whether the term of the contract of 1928 made by the Light and Power Company would expire on May 1, 1938. Therefore, it is difficult to know whether the Power Company in continuing to supply power, and the defendants in continuing after May 1, 1938, to receive it and pay for it, were proceeding on the assumption that the contract was still binding upon them, or upon some other assumption. There is no evidence of interviews or correspondence between July 20, 1937, when the judgment of the Court of Appeal was pronounced, and May 1, 1938, except that on August 5, 1937, the Power Company published a revised schedule of "net rates applying to standard contracts"—presumably the contract of 1928, which is on a printed form, was a "standard" contract—which new schedule was to be effective on January 1, 1938, and that on February 3, 1938, the Power Corporation announced that on January 1, 1939, certain new rates "applying to standard contracts" would come into force.

As to the dealings after May 1, 1938, what the evidence discloses is: (1) a letter from the Power Company to the defendants dated February 1, 1939, announcing "reduced rates to the Mines

on standard contracts, effective January 1, 1940"; (2) a letter from the defendants to the Power Corporation dated February 27, 1939, saying: "Our accountants advise us that monthly bills for power were sent to us for amounts in excess of our obligation, and that by inadvertence, and relying on the good faith of the billing, we have overpaid the amount of \$22,500.00. The details are as follows: 1937, \$10,000; 1938, \$10,000; 1939, \$2,500 —\$22,500. We assume your billing was inadvertent, as were our payments, and we should be glad if you would let us have your cheque for the above amount, or if you prefer, credit us on our next payment for such balance"; (3) that on February 15, 1939, the Power Company's bill for current supplied during January was paid by a cheque marked "Paid Under Protest"; (4) that in February Mr. Harrison, Vice-President and General Manager of the Power Company, gave to Mr. Blomfield, the defendants' Managing Director, a memorandum (Ex. 12) showing the rate reductions made from time to time by the Power Company, in which memorandum there was the statement that clause 15 of the contract had been lived up to "as no other Customer of the Company using equal or similar amounts of power is paying a price below that of the Lake Shore Mine", and that about March 7 these gentlemen had a discussion in the course of which Mr. Harrison, as he puts it, explained the Power Company's "side of the situation" and also told about the *Hollinger* case and suggested that the Lake Shore Company keep out of that case, promising that if the defendants did keep out the Power Company would rebate to them any amount found, on the footing of the ultimate judgment, to have been overpaid, and that he delivered to Mr. Blomfield a letter previously prepared (and apparently erroneously dated) setting out this proposition and adding that "It is only fair to your Company and to us, that this letter should be treated as having been written without prejudice to your legal rights and ours, whatever those legal rights may be declared to be"; (5) that the letter just mentioned was not answered, but that the defendants did keep out of the *Hollinger* case; (6) that on June 30, 1939, the chief engineer of the Power Corporation wrote to the defendants, "confirming telephone conversation of last evening," and saying that the Power Corporation was prepared to offer to the defendants "the complete Substation" then installed on their property at the price of \$56,700, including four transformers and certain circuit break-

ers, etc.; (7) that, as already stated, the bills for power taken by the defendants from October 1939 to April 1940, inclusive, were not paid in full (see Ex. 15); (8) that on December 4, 1939, Mr. Harrison wrote to the defendants, "Att.: Mr. A. L. Blomfield, Managing Director", saying, "You will recall that at our conference in Toronto on Oct. 28th, when our power contract with your Company was under review and you outlined your proposed arrangement to take your power from the Hydro, the question arose as to whether we deemed our contract with you had come to an end on May 1st, 1938. At that time, I intimated to you that I was not at all sure that a contract did not still exist between us for the supply of power to you. Since that conference, we have submitted the question to our solicitors and they advise us that a contract between us still exists. We are directing this communication to you in order that your attention will be drawn to the matter before you embark on any consequential capital expenditures or commit your company in a binding contract to take your power from Hydro without further reviewing the position between ourselves and your Company. . . . We suggest that we make some further effort to arrive at some satisfactory arrangement and again respectfully draw attention to the opinion of our solicitors with respect to the contractual relations which they advise now exist between us"; (9) that Mr. Blomfield answered on December 11, saying in part, "If you would be kind enough to indicate to us what that contract is, and particularly for what period of time it might be thought to cover, we shall be happy to give the matter further consideration, and if desirable to have a further conference with you on the subject"; (10) that on January 31, 1940, Mr. Blomfield wrote to Mr. Harrison with a cheque for the purchase price of the equipment mentioned in the letter of June 30, 1939, (there having been meantime no acceptance of the offer to sell and no conversation about the equipment), and that on the same day Mr. Blomfield wrote to the Power Company a registered letter saying, "We are writing to advise you that we will not require to be supplied with electrical power by you from and after April 30th, 1940"; (11) that on February 19, 1940, Mr. Harrison wrote letters in answer to the two of January 31, saying to Mr. Blomfield that the cheque could be accepted only on the understanding that "our position as to power supply is not thereby to be affected", and "We, of course, contend that our right to supply and to be paid for power

cannot be terminated on 30th April, 1940," and in his letter to the company, saying, "Does this mean you will not be using electrical power or that you will get your supply from another source and will not expect to make further payments to us? If the latter is what you intend, might we ask you to indicate on what view of your contractual relationship with us you take that stand. We consider it is not in accordance with our present contractual rights with you. Your contract with us of May 1st, 1928, was for the life of the mine and in view of all what has happened is, we think, in force notwithstanding the provisions of The Public Utilities Act. You will also remember our express contract with you dated 1st November, 1929, whereby you agreed that on the completion of the change from 60 to 25 cycle equipment, you would enter into a new electrical contract similar in form and agreement with the contract of 1st May, 1928, the new contract to provide for a total supply of 12,000 h.p., 25 cycle"; (12) that on February 21 Mr. Blomfield wrote, "to confirm the purchase" of the substation and saying, "We shall be glad at a later date to arrange with your Mr. Harrison, in accordance with our understanding with him, an exact hour on the 30th day of April to complete the shutting off of the power supply, as we shall require to take off the load to accomplish same"; (13) that on February 22, 1940, Mr. Blomfield wrote to Mr. Harrison acknowledging his letter of February 19, and saying, "It seems to me the points you raise are legal problems, and as we have taken the advice of our solicitors in the matter, I feel that no good purpose will be served by you and me discussing it further in correspondence"; (14) that on February 26, Mr. Blomfield wrote a further letter to confirm the fact that the sale of the equipment was not to be prejudicial to the position of either of the companies; (15) that on March 13, 1940, Mr. Harrison wrote accepting the cheque for the equipment, "on the understanding that acceptance is not in any way to prejudice our contention that you are not entitled to use any system of electricity other than ours in your premises without our written consent", and adding that if no satisfactory settlement could be reached the defendants would have to take action to protect what they considered to be their rights, and further that in the interview of October 28, 1939, already referred to, he had called Mr. Blomfield's attention to the fact that, as that was the first occasion on which the effect of the *La Roche* judgment had to be considered, he

would take the matter up with the Power Company's solicitors; (16) that Mr. Blomfield wrote on March 19, 1940, agreeing to the use of the cheque without prejudice to the Power Company's contention and expressing regret that his recollection of the interview of October 28, was "not in accord with" Mr. Harrison's but not indicating wherein he thought Mr. Harrison's recollection was incorrect; (17) that the writ in this action was issued on April 3, 1940, that a notice of motion for an interlocutory injunction was served promptly, and that on April 18, the motion was dismissed, counsel for the defendants undertaking that pending the trial all requisite accounts of power taken from the Commission would be kept and would be made available for the plaintiffs; (18) that on April 23, the defendants wrote asking that the switches controlling the lines from the Power Company's substation to the mine's substation should be opened at a stated hour on April 30, and that the connection was broken at that hour, Mr. Harrison having first demanded and received an assurance that nothing done by the Power Company should be treated as acquiescence but should be entirely without prejudice to the Power Company's right; (19) that in addition to opening the circuit breakers the Power Company removed some cables and hung them on poles so that they would be ready for the resumption of the service, and that they can quickly—Mr. Harrison thinks in about half an hour—be reconnected; (20) that the Power Company has always maintained "normal voltage and frequency . . . at the point of delivery," (except, of course, that the point of delivery is by one of the special conditions of the contract of 1928 "at outside wall of Consumer's Transformer House" and that, as just stated, the cable leading from the Power Company's plant to the transformer house has been cut) and has, therefore, according to No. 12 of the general conditions continued to tender the power to the defendants.

The foregoing statement of the evidence relating to the dealings between the parties subsequent to May 1, 1938, has been made very full, perhaps to the point of prolixity, because it is only from those dealings that it is possible to arrive at a conclusion as to whether after the expiry of the ten-year period established by the judgment in the *La Roche* case the parties tacitly made a new agreement for the "mining life of the properties", i.e., for a term expiring in 1948. The question as to whether such a tacit agreement was made will be considered first without refer-

ence to the question whether such a tacit agreement is enforceable notwithstanding s. 4 of The Statutes of Frauds, R.S.O. 1937, c. 146, which is pleaded, but in passing it may be noted that there is no evidence that the mining life of the properties was bound to continue for more than a year from May 1, 1938. It has, of course, continued, and there is the statement of Mr. Harrison made during an examination held on April 13, 1940, and confirmed at the trial, that although he is not a mining engineer his opinion is that the mining life of the properties will be much more than three or four years (from the time of the examination); but that is all that there is by way of evidence on the point.

In my opinion, it is impossible from the facts disclosed to draw the inference, and to find as a fact, that the parties tacitly entered into a new life-of-the-mine contract running from May 1, 1938. Each of them appears to have proceeded upon the assumption that some agreement limited the price that the defendants could be charged for such power as they took; or, rather, the defendants appear to have proceeded upon that assumption and the Power Company to have rendered its bills upon the footing of the published prices payable by mines holding "standard contracts" and using no greater quantity of power than the defendants were taking. If it could be established that the defendants continued to use the power in the belief that they were bound by agreement to take from the Power Company all the electrical energy that they required for use in their mines, it would be clear that their action was not evidence of the tacit making of a new life-of-the-mine contract: see *In re Northumberland Avenue Hotel Company* (1886), 33 Ch. D. 16, and the discussion of that case by Kay J. in *Howard v. Patent Ivory Manufacturing Company*; *In re Patent Ivory Manufacturing Company* (1888), 38 Ch. D. 156, and compare *Britain v. Rossiter* (1879), 11 Q.B.D. 123. That finding, however, cannot be made because there is no evidence as to what the defendants' directors or officers did in fact believe. It is probable, as has been remarked already, that soon after July 27, 1938, they heard something about the judgment of the Privy Council in the *La Roche* case, and, therefore,—if they thought about the question at all—that they must have had some doubt as to whether they were still bound by the contract of 1928. Mr. Slaght says that they were in fact bound until November 1, 1939, by the "change-

over" contract of 1929. He says that that contract bound the defendants from the day of its date until the completion of the change-over (*i.e.*, until June 15, 1932) to take power from the Power Company on the terms of the contract of 1928 and thereafter (not during the mining life of the properties, but for a term limited by the statute to ten years from November 1, 1929) to continue to take their power from the Power Company on the same terms, the power, however, for this second period of the ten-year term being 25-cycle power instead of partly 60-cycle and partly 25-cycle power as in the first period; and he suggested that this obligation created by the contract of 1929 was in Mr. Blomfield's mind, that all of the defendants' acts between May 1, 1938, and November 1, 1939, are to be attributed to it, and, therefore, that they cannot be taken as evidence of the tacit making of any new agreement. It is, of course, possible that Mr. Blomfield held and acted upon some such belief as counsel suggests; but he was not called as a witness at the trial and, as has been remarked before, there is no possibility of a finding that he believed that his company's obligation continued until November 1, 1939. But if the mining operations were to go on, the defendants had to have a supply of electrical energy; without acquiring in some way the right to use the Power Company's transformer that had been erected on their premises or the purchase and erection of another transformer, they could not take power from any source other than the Power Company's transmission lines; and it appears to me that upon the evidence a finding that they continued to avail themselves of that supply without considering whether they had a right to compel the Power Company to continue to make a supply available would be just as likely to be correct as a finding that they continued to take the power because they thought they were bound to do so. However, neither the one finding nor the other can be made.

The decided cases, or rather, those of them that were discussed by counsel, are not of great assistance. From early times it has been held that if a tenant who has entered under a lease that was void or under a lease the term of which has expired continues in possession and pays rent which the owner accepts as rent, all idea of trespass is excluded; a tenancy of some kind must have been created and "no other tenancy appearing" that tenancy must be considered as one from year to year: *Doe d.*

Martin and Jones v. Watts (1797), 7 T.R. 83, 101 E.R. 866, or a tenancy from year to year on the terms of the old tenancy so far as consistent with a tenancy from year to year; *Dougal v. McCarthy*, [1893] 1 Q.B. 736. See also *Croft v. William F. Blay, Limited*, [1919] 1 Ch. 277. It was suggested by counsel that by analogy it ought to be found that after May 1, 1938, there was a new agreement for *some* term; that there could not possibly have been in the minds of the parties the making of an agreement for a year or from year to year; that what must have been in their minds was the renewal of the contract of 1928, which had come to an end, not because of any act of theirs, but merely by force of the statute; that what they always had had in mind was an agreement for the mining life of the defendants' properties; and, therefore, that they must be taken to have contracted to renew for the mining life of the properties, that is to say, regard being had to the statute, for ten years. The analogy does not, in my opinion, quite hold good. The defendants were not in occupation of the Power Company's properties, and I fail to see why from their acceptance and use of the power which the Power Company offered by maintaining the requisite voltage in its cables there ought to be drawn the inference that the Power Company agreed, or agreed for any definite term, to maintain that voltage and that the defendants agreed, or agreed for any definite term, to abstain from using other power. The defendants, having used some of the power made available by the Power Company, of course, came under obligation to pay for the power so used; see *Lea Bridge District Gas Company v. Malvern*, [1917] 1 K.B. 803; and the only possible method of arriving at the price that they ought to pay is to look at the contract of 1928 and the later published tables of rates. But there was no absolute necessity of a contract for a definite term. There would have been necessity for such a contract in the first instance, because the Power Company could not have afforded to make the capital expenditure involved in the construction of power lines and the installing of apparatus without some assurance of a fairly permanent market for the power which it was agreeing to hold in reserve for the defendants; and the defendants could not have afforded to install electrical machinery without some assurance of a supply for a reasonable time of the current necessary for the operation of the plant. But there is nothing in the evidence to suggest that in 1938 the supply of power by

the Power Company or the use of it by the defendants involved either party in the expenditure of capital; the capital had been expended; it suited both parties to continue to operate as they had been operating for the past ten years; and I think it is highly improbable that either of them thought of exacting from the other a promise to continue the then existing practice for any definite period. To find, then, that the minds of the parties met on an agreement for a term would be to find as a fact something that, in my opinion, is neither disclosed by the evidence nor even, probably, true. Taking this view of the facts, I do not stop to consider the plea of The Statute of Frauds.

Then as to whether a contract was made running from 1932 to 1942. The suggestion, or one of the suggestions of counsel, was that the change-over agreement of 1932 provided for a period of preparation for the use by the defendants of 25-cycle power instead of 60 and 25-cycle; that upon the completion of the preparations the defendants were to "enter into a new electrical contract similar in form and agreement with" the contract of May, 1928, which new contract should provide for a total supply by the Power Company to the defendants of 12,000 h.p. of 25-cycle power supply; that the terms of that new contract were all settled—there being nothing in the contract of 1928 that required change except the description of the kind of power to be supplied and the statement of the amount (12,000 h.p.); that a contract "similar in form and agreement" with the contract of 1928 would necessarily be a contract for the mining life of the properties; and that the parties by going on to supply and accept the 25-cycle power did in fact "enter into" the "new electrical contract" for the mining life of the properties (or, by force of the statute, ten years). On this theory the question whether the mutual obligations of the parties under the agreement of 1929 must come to an end in 1939 was said not to arise. It was said that the agreement made in 1929 to enter into an agreement when the time for entering into it arrived was in fact executed in 1932.

I am not able to follow this argument. It is somewhat difficult to understand why it was thought necessary or desirable to include in the contract of 1929 a stipulation as to entering into a new electrical contract upon the completion of the "change over". The agreement of 1929 seems to contain all the requisite provisions as to the ownership and use of the electrical equipment

that the Power Company was to install on the defendants' property, and the amount of the "total supply" by the Power Company of 25-cycle power is set out; no provision for any change in the rates to be charged for power taken by the defendants appears to have been in contemplation; the agreement of 1928 seems to have established a complete code of working rules. Therefore, the inference that the failure to draw up and execute a new electrical contract in 1932 is attributable to the fact that neither party at that time was aware of any necessity for such a new contract appears to me to be just as reasonable as an inference that tacitly they entered into such a new contract. When a tenant, after the expiration of the term of his lease, is found occupying the premises and paying rent, the inference that a new term was created by agreement seems to be—or courts have deemed it to be—more or less inevitable. But a presumption that the Power Company and the defendants made an agreement in 1932 is, for the reasons that have been stated, by no means inevitable. "Presumptions of fact are inferences which the mind naturally and logically draws from given facts": Phipson on Evidence, 8th ed., p. 4. "Implied terms . . . can only be justified under the compulsion of some necessity": per Lord Russell of Killowen in *Luxor (Eastbourne), Limited, et al. v. Cooper*, [1941] A.C. 108 at p. 125—"The implication must arise inevitably to give effect to the intention of the parties": per Lord Wright in the same case at p. 137. Here it is not a question of implying a term of a contract, but of implying the making of a complete contract, and, in my opinion, "the compulsion of some necessity" for doing so is at least as requisite as in the case of a mere term; and, for the reasons already stated, I think that that compulsion does not exist and that the inference ought not to be drawn.

If I am right in thinking that it cannot be found that either in 1938 or 1932 the parties tacitly agreed that the Power Company should supply and the defendants should take power for the term of the mining life of the defendants' properties (*i.e.*, in the one case for a term to expire in 1948, or in the other for a term to expire in 1942), what remains to consider is an alternative contention that the contract of 1929 in itself was effective to bind the parties to it for a term commencing after the completion of the change-over (*i.e.*, until 1942).

What the agreement of 1929 said as to the period following the completion of the change-over was that the customer (the defendants) should enter into a new electrical contract similar in form and agreement with "the present existing contract . . . dated the first day of May, 1928", such new contract to provide for a total supply by the Power Company to the defendants of 12,000 horsepower 25-cycle power supply. But the form of the clause—the provision for entering into a new contract—does not necessarily create any great difficulty. In *Hillas and Co. Limited v. Arcos Limited* (1932), 147 L.T. 503, a contract to buy a certain quantity of softwood goods "over the season 1930" upon certain conditions that were set out contained this clause, "(9) Buyers shall also have the option of entering into a contract with sellers for the purchase of 100,000 standards for delivery during 1931. Such contract to stipulate that, whatever the conditions are, buyers shall obtain the goods on conditions and at prices which show to them a reduction of 5 per cent. on the f.o.b. value of the official price list at any time ruling during 1931. Such option to be declared before the 1st Jan. 1931." Such option was declared before January 1, 1931, and it was held in the House of Lords that a contract for 1931 had been created. In the course of his judgment Lord Wright said (p. 515):

"Some confusion has been imported, as I think, into the question by dwelling on the exact words—'the option of entering into a contract,' and it is said that this is merely a contract to enter into a contract, whereas in law there cannot be a contract to enter into a contract. The phrase is epigrammatic, but may be either meaningless or misleading. A contract *de praesenti* to enter into what, in law, is an enforceable contract, is simply that enforceable contract, and no more or no less; and if what may not very accurately be called the second contract is not to take effect till some future date but is otherwise an enforceable contract, the position is as in the preceding illustration, save that the operation of the contract is postponed. But in each case there is *eo instanti* a complete obligation. If, however, what is meant is that the parties agree to negotiate in the hope of effecting a valid contract, the position is different. There is then no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing; yet even then, in strict theory, there is a contract (if there is good consideration)

to negotiate, though in the event of repudiation by one party the damages may be nominal, unless a jury think that the opportunity to negotiate was of some appreciable value to the injured party. However, I think the words of clause 9 in this case simply mean that the appellants had the option of accepting an offer in the terms of clause 9 so that when it was exercised a contract at once came into existence, unless indeed the terms of the option embodied in the clause were not sufficiently certain and complete." Applying these words to the present case my opinion is that the agreement in 1929 to enter into a new electrical contract similar in form and agreement "with" the contract of 1928, was an agreement to enter into a new contract running for the life of the mine and that it was in itself an enforceable contract (subject, of course, to the statute), although it was not to take effect until the change-over was complete. The question then is simply whether the obligation to supply and take power was, by force of the statute, brought to an end in 1939.

It is not, in my opinion, correct to say that the statute necessarily deprives a power company of the right to contract effectively to supply power for a period of 10 years beginning in the future. What s. 22 says is that "The corporation may, from time to time and upon such terms as may be deemed advisable, enter into contracts for the supply of a public utility to any person for any period not exceeding ten years." It does not say that the ten-year period must begin on the day on which the contract is entered into; and I think it would be quite within the power of a power company to agree with a prospective customer that when he had constructed a plant which was to be operated by electrical power, the company would for a period of ten years supply him with the requisite power. Therefore, I appreciate the force of the contention that the supply of power under the agreement of 1929 was not to begin, and did not begin, until the completion of the change-over in 1932, and that the supply during the period November 1, 1929, to June 15, 1932, was not a supply under the agreement of 1929, but under the revised contract of 1928, and, therefore, that the statute did not stand in the way of the effectiveness of the agreement of 1929 during the period June 15, 1932, to June 15, 1942. But after much consideration I have reached the conclusion that the supply and use of power under the agreement of 1929 in fact began with the making of

that agreement, and that the statute put an end to the term on November 1, 1939.

It is quite true that the agreement of 1928, although made by the Light and Power Company, was effective to bind the Power Company to supply power, and the defendants, if they required it, to take it from the Power Company, until May 1, 1938 (or, as the parties probably believed in 1929, during the mining life of the properties), so that there was no need in 1929 to contract for a power supply during the period of the contemplated change-over—provided the 6,000 h.p. of 25-cycle power which the defendants were entitled to receive under the agreement of 1928 was going to be sufficient for their needs during that period. Nevertheless, I think—although I confess that I am not free from doubt—that the agreement of 1929 does by necessary implication amount to a contract for the supply of a public utility during the period preceding the completion of the “change-over”. The agreement was, so far as the evidence discloses, the first agreement made directly between the newly incorporated Power Company and the defendants; it expressed the permission granted by the defendants to the Power Company to change the 60-cycle electrical equipment into 25-cycle electrical equipment; the change was to be effected gradually and to suit the convenience of the defendants, and it was to be so arranged between the Power Company and the defendants that interference with the operation and production of the defendants’ plant should be reduced to a minimum. It was not stipulated in so many words that during this period of gradual and convenient replacement of equipment the Power Company should supply the defendants with power; but the fact that the Company was so supplying them with power was recited, and I think that there was by necessary implication an undertaking on the part of the Power Company to supply the requisite power during this period of gradual and convenient replacement of equipment even if it happened that before the change-over was complete the replacement of some of the equipment created the need for a quantity of 25-cycle power in excess of the 6,000 h.p. which the defendants were entitled to demand under the agreement of 1928. There is no evidence to induce the belief that such a state of affairs as would give rise to the necessity for the use of more than the 6,000 h.p. of 25-cycle power was at all certain to arise pending the completion of the change-over; and the part of the

examination of Mr. Harrison as a witness on the motion for an interlocutory injunction, in which the quantities of power (of whatever cycle) taken by the defendants in certain years is stated (QQ. 202-3)—even if it is permissible to look at that examination—does not indicate clearly that the situation did in fact arise. But I think that when the whole of the document of 1929, including the recital and the stipulation, is looked at, it must be found that there is arising out of it this obligation to supply (if needed) more than the 6,000 h.p. of 25-cycle power, and that the agreement ought to be treated as a contract for the supply of a public utility for a period beginning in 1929 and, as a result of the statute, ending in 1939. It is a border-line case; I have found it very difficult to satisfy myself whether the agreement ought to be deemed to be one of those permissible agreements by a power company for the supply of power for a ten-year period beginning in the future to which reference has been made, or one of those agreements that are by the statute and the decision in the *La Roche* case rendered ineffective after ten years from the day on which they are made. But the plaintiffs' whole case depends upon their ability to prove that in 1940 the defendants continued to be bound by some agreement to refrain from using any system of electricity other than that furnished by the Power Company, and my opinion is that, all things being considered, it is impossible to say that this essential fact is proved by the production of the agreement of 1929. Therefore I think that the plaintiffs have not made out their case for damages for the loss sustained by the Power Company in consequence of the fact that during the period April 30, 1939, to June 15, 1942, the defendants obtained their power from the Commission instead of from the Power Company.

The Power Company, of course, is entitled to judgment for the unpaid portion of the price of the power actually used by the defendants in the period October 1939, to April 1940, inclusive. There is no dispute about the measurement of the power and it is not denied that upon the footing established by the judgments in the *Hollinger* case the Power Company's bills for the power supplied during the period were correct. The main dispute may perhaps be shortly stated by an example. For the current supplied during the month of October 1939, the Power Company charged \$37,218.01 and stated on the face of the bill rendered that if the account was paid within the discount period

of fifteen days the amount would be \$33,496.21. The defendants contended that the proper charge was \$34,446.91 and sent their cheque for that sum less ten per cent., *i.e.*, \$31,002.22. What the agreement of 1928 provides as to a discount for prompt payment is as follows: Clause 1 of the general conditions of that agreement reads: "Accounts shall be subject to the discount for prompt payment hereinafter stated if paid within fifteen days of accounts, and to interest at the rate of 7 per cent. per annum from sixty days after the date of accounts if not paid within this period"; and in the special conditions, under the heading "Price" and after the statement of the rates payable per h.p. per month, are the words "all less ten per cent for prompt payment". If the contract is what governs, the defendants, not having paid the bill in full (less the discount), did not acquire any right to a discount; and if the offer made by the Power Company on the face of the bill to accept the smaller amount if paid within 15 days is what governs, the result is the same; in either case, the defendants owe \$6,215.79, in respect of October (see Ex. 18). But the bill rendered by the Power Company on December 1, 1939, for current supplied during November had at the foot the following: "Arrears;—Balance unpaid for month of October 1939, \$2,493.99", that is to say, the Power Company seemed in this bill to be admitting that the amount of the under-payment for the current supplied in October was the difference between the net amount of the bill dated November 1 and the sum paid by the defendants (\$33,496.21—\$31,002.22=\$2,493.99). Each of the later bills rendered during the period in question showed, under the heading "Arrears", unpaid balances for the preceding months of the period similarly computed (see Ex. 15), and in a letter of March 20, 1940, written by the assistant secretary-treasurer of the Power Company to the defendants is a similar statement of under-payments up to February, coupled with the statement that the Power Company is accepting the cheque issued in respect of the bill rendered for power supplied in February as a partial payment only of the account rendered, and that the Power Company specifically reserves all its rights whether arising out of its contract or otherwise. Counsel for the defendants contends, not that any estoppel has been created, but that by this rendering of accounts and apparent acquiescence in the position being taken by the defendants in respect of the discount, there was established a course of dealing from which

the Power Company is not entitled to recede. If the defendants had from month to month paid the arrears shown in the Power Company's bills and the Power Company had given unqualified receipts there might perhaps have been a basis for this contention. But the defendants have not paid. On the contrary, they plead that since the termination of the contracts, "if such contracts ever existed", they have been taking power from time to time at the market price from the Power Company, "which company has from time to time attempted to overcharge the defendant in amounts over and above the market price for such power", and they go on to assert that they are not indebted to the plaintiffs in any sum whatever. In these circumstances, I think that when an account comes to be taken of the sum due from the defendants in respect of power actually taken and not paid for the account must be made up on the true basis indicated in Ex. 18 and not on the erroneous basis indicated by the monthly accounts rendered.

There is a dispute also as to the rate of interest payable on the unpaid monthly balances. The plaintiffs claim the contract rate of 7 per cent. whereas the defendants contend that no more than the statutory rate should be allowed.

This question is rather more difficult than the question as to the discount. The claim to a discount for prompt payment, whether made on the footing of the contract of 1928 or on the footing of the offer made by the Power Company in its monthly bills, fails because of non-performance by the defendants of the condition, and there is no need to consider whether the defendants were by contract given a conditional right to a discount during the period October, 1939, to April, 1940. But the plaintiffs' claim to interest at the higher rate must, if valid, be based upon some contract. There does not appear to be much room for doubt that the claim for interest on the sum unpaid in respect of the power taken in October, 1939, is supported by a contract. Counsel for the defendants contended, as has been mentioned, that the contract of 1929 was in effect a contract for the supply of power until October 31, 1939, on the terms of the contract of 1928, and my reasons for agreeing with that contention have been stated. It follows that the provision that "accounts shall be subject to . . . interest at the rate of 7% per annum from sixty days after the date of accounts if not paid within this period", is applicable in the case of the bill rendered

for the power supplied in October. But as regards the power supplied in November and the later months, the case is different. The defendants then, as they plead and as I think, were taking power at what they call the market price, and the only manner in which that market price can be ascertained is to look at the contract of 1928 and the published lists of prices to be charged to mining companies. But whether it is legitimate to look at the contract for the purpose of ascertaining the result of a failure on the part of the defendants to pay the monthly bills within sixty days of their date is not so clear. The analogy to the case of a yearly tenancy created by an overholding and the payment and acceptance of rent is incomplete, because, as has been stated already, no agreement to supply or use power after October 31, 1939, can be found to have come into existence; there was simply the offer and acceptance of power and the consequent obligation to pay. However, my opinion is that the analogy holds to the extent of requiring the assumption that the obligation to pay was not the bald obligation to pay forthwith such as arises, for instance, when a customer accepts goods offered by a shop-keeper, but an obligation to pay at the times and upon the terms established by the contract and the practice followed during the time when the contract was in force. So I think that interest on the amount of any monthly bill did not run from the date of the bill, but from the sixtieth day after the rendering of the bill, and that when it ran it ran at the rate provided by the contract. It was on this footing that the Power Company prepared for use at the trial the statement (Ex. 18) to which frequent reference has been made, and I think that that statement is correct as far as it goes, and that the account that will have to be taken before judgment is signed ought to be made up upon the same footing.

The action of Canada Northern Power Corporation, Limited fails and must be dismissed. Northern Ontario Power Company, Limited, will have judgment for the principal sum shown in Ex. 18, \$40,702.21, with interest at the rate of 7 per cent. per annum on each item going to make up that total from sixty days after the rendering of the relevant account until judgment.

As to the costs: The most important of the claims put forward in the action was the claim, which fails, for an injunction to restrain the defendants from using any system of electricity other than that furnished by the Power Company. But the claim

in respect of which the Power Company succeeds is a claim for a substantial sum of money and I think the Power Company is entitled to the costs of the action, except the costs of the motion for an interlocutory injunction, which costs ought to be ordered to be paid by the plaintiffs to the defendants and to be set off against the costs payable to the Power Company. At the trial there was some argument as to the status of the Canada Northern Power Corporation, Limited, but otherwise there is nothing to indicate that the costs were materially increased by the joining of that corporation as a party, and I do not think that any order for payment of costs by it ought to be made or that in the taxation of the Power Company's bill there ought to be any attempt to distinguish between the costs of the plaintiffs generally and the costs of the Power Company in particular.

Judgment accordingly.

The plaintiffs appealed from the above judgment.

18th, 19th, 20th and 21st October 1943. The appeal was heard by ROBERTSON C.J.O. and FISHER, HENDERSON, GILLANDERS and LAIDLAW J.J.A.

C. F. H. Carson, K.C. (*W. M. Gordon*, with him), for the plaintiffs, appellants: The 1928 contract was not affected by s. 22 of The Public Utilities Act, R.S.O. 1927, c. 249, because the Light and Power Company was incorporated in 1911, before the original of s. 22 was made applicable to companies supplying electric power. The Light and Power Company had full capacity to enter into a contract for the life of the mine, and the Power Company, having succeeded to all the rights of the earlier company, was entitled to enforce it. Further, the Light and Power Company, as appears from the objects set out in the letters patent, was not "incorporated for the purpose of supplying any public utility", and therefore the Act was inapplicable to it. [ROBERTSON C.J.O.: Surely that need not be the sole purpose of the company?] The objects and purposes of the company must be considered as a whole.

Even if the restriction applied to the Light and Power Company, the other plaintiff, a Dominion company, was not subject to the restrictions created by a provincial statute, and is entitled to have the contract performed by the defendant. [ROBERTSON C.J.O.: It only guarantees performance of any legal obliga-

tion imposed upon the Light and Power Company. The trial judge has found that there was no reciprocal obligation. There was no promise from the defendant to the Power Corporation.]

Assuming that s. 22 did apply to the contract, it is to be inferred, from the conduct and dealings of the parties after 1st May 1938, that they then made a new contract for the mining life of the properties, which would be limited, by force of the statute, to 1st May 1948. The trial judge should not have applied, in the discussion of this question, the principles laid down in *Luxor (Eastbourne), Limited et al. v. Cooper*, [1941] A.C. 108. That was a case where it was sought to imply a term in a formal contract reduced to writing by the parties; it is a very different thing to imply the existence of a contractual relationship from the conduct of the parties, in the absence of any written agreement. We supplied power and the defendant accepted it. We billed the company and the bills were paid, until there was a dispute about reductions in rates. Alternatively, a new contract is to be implied from the completion of the change-over, in 1932, to run for ten years from that time. [ROBERTSON C.J.O.: How can you imply a new contract from the conduct of the parties if they both thought that they had already a valid and subsisting one?] [HENDERSON J.A.: What is to be the term of such an implied contract? Is it for the mining life of the properties, for ten years, or for a reasonable time?] The parties agreed to make a new contract on the completion of the change-over, similar in form and agreement with the existing one, and equity looks on that as done which ought to have been done. In this connection, I refer to *Lea Bridge District Gas Company v. Malvern*, [1917] 1 K.B. 803.

The new contract must be taken to have been made on the same terms as that of 1928, including the term prohibiting the defendant from purchasing power elsewhere: *Kelly v. Patterson* (1874), L.R. 9 C.P. 681; *Cole v. Kelly*, [1920] 2 K.B. 106 at 132; *Dougal v. McCarthy*, [1893] 1 Q.B. 736 at 739, 742.

Further alternatively, the contract of 1929 was not to commence or become effective until completion of the change-over, i.e., on 15th June 1932, and it therefore ran, by force of the statute, until 15th June 1942. [ROBERTSON C.J.O.: But would not that construction enable the Power Company to do by two contracts what it is expressly prohibited from doing in one?]

The defendant pleaded s. 4 of The Statute of Frauds, R.S.O. 1937, c. 146, but this contract is not within that statute. As pointed out by the trial judge, the mining life of the properties was not bound to continue for more than a year: *Wells v. Horton* (1826), 4 Bing. 40 at 42-3, 130 E.R. 683; *McGregor v. McGregor* (1888), 21 Q.B.D. 424 at 426, 431; *Kijko v. Bacyzski* (1921), 51 O.L.R. 225 at 227, 67 D.L.R. 46. In any case, there was a sufficient memorandum in writing.

If the contract was one for an indefinite period, then we were entitled to reasonable notice of termination, and the three months' notice actually given was not, in all the circumstances, reasonable.

As to damages, I refer to *The City of Montreal v. The Montreal Light, Heat and Power Company* (1909), 42 S.C.R. 431; *Kaministiquia Power Co. v. Superior Rolling Mills Co. Limited* (1915), 8 O.W.N. 518, affirmed 9 O.W.N. 96; *Gatineau Power Company v. Fraser Companies, Limited*, 15 M.P.R. 511 at 522, 535, 536, 537, 548, [1941] 2 D.L.R. 487.

A. G. Slaght, K.C., for the defendant, respondent: The Light and Power Company is undoubtedly one of those to which s. 22 applies. The second of its purposes and objects is the manufacture and sale of electric power, and this need not be the only object of the company.

As to damages, the Power Company was not able to supply our requirements, but would have had to buy from the Hydro-Electric Commission. [LAIDLAW J.A.: But there was apparently a very significant drop in the Power Company's purchases from the Commission when it ceased to supply you.]

It is true that the Power Corporation is not subject to the restrictions of s. 22, but it was not really a party to the contract, and we did not agree with it to do anything. Our only obligation is to the Power Company.

The 1929 contract was a contract for the supply of power, which became effective immediately, and expired, by force of the statute, in 1939. Electricity is undoubtedly a public utility, within s. 16 of the Act, and s. 22 is prohibitive. I do not suggest that the parties lacked capacity in 1929. My contention is that the 1929 contract provided for a supply of power, to commence, not at a future date (the completion of the change-over), but immediately. [LAIDLAW J.A.: Is there anything in the judgment in the *La Roche* case that prevents a company from surrendering an exist-

ing contract and making a new one?] No. [GILLANDERS J.A.: I have difficulty in viewing the 1929 contract as one to supply power during the change-over.] [ROBERTSON C.J.O.: There was nothing to prevent the parties from saying that when the change-over was completed the 1928 contract did not fit the circumstances, and making a new contract by conduct. The question is, did they do so?] They could not agree, in 1929, for the supply of power to commence at a future date, so as to make the total term, from the making of the agreement, more than ten years.

R. I. Ferguson, K.C., for the defendant, respondent: The statement of claim does not set up the making of a new contract in 1932. The plaintiffs are in effect relying upon estoppel, and estoppel is nowhere pleaded.

C. F. H. Carson, K.C., in reply.

Cur. adv. vult.

16th December 1943. ROBERTSON C.J.O.:—An appeal from the judgment of the Chief Justice of the High Court, dated 13th April 1943.

By the judgment appealed from, the appellant Northern Ontario Power Company, Limited, one of the plaintiffs, was awarded the sum of \$49,361.90, as the balance owing in respect of the price of power actually supplied by it to, and taken by, the respondent, on and prior to 30th April 1940, with interest. The appellants also claimed a declaration that the respondent was not entitled to terminate the supply of electric power to it on 30th April 1940, or to use, on and after that date, electric power from any system other than the appellants', and other relief. In these respects the action was dismissed. It is from this partial dismissal of the action that the appeal is brought.

As I agree in the result at which the learned Chief Justice arrived, and as, except in respect of one of the appellant's alternative claims, I also agree with his reasons, it is unnecessary for me to set out the facts, nor need I discuss the grounds upon which the Chief Justice proceeded, except in the case of the claim which is based upon the contract of 1st November 1929. With respect, I am unable to adopt the reasons of the Chief Justice for dismissing this claim, although I agree that the claim fails.

There was in existence when the contract of 1st November 1929 was made, between Northern Ontario Power Company, Limited and the respondent, a contract dated 1st May 1928, for

the supply of 6,000 h.p. of 25-cycle power, and 6,000 h.p. of 60-cycle power to respondent "for the mining life of the properties now or hereafter operated or owned or controlled by" respondent in the Kirkland Lake district. This contract was made with the respondent by Northern Ontario Light and Power Company, Limited, and Canada Northern Power Corporation, Limited "intervened" to guarantee the performance of the contract by Northern Ontario Light and Power Company, Limited. The last-mentioned company and Northern Canada Power, Limited (an Ontario company, not to be confused with Canada Northern Power Corporation, Limited, a Dominion company) later entered into an amalgamation agreement, dated 1st October 1928, which was confirmed by letters patent, dated 20th December 1928, and became "Northern Ontario Power Company, Limited." Therefore, on and from the date of the letters patent the two corporations were deemed and taken to be amalgamated, and to form one corporation, possessing all the property rights and privileges and franchises, and subject to all the liabilities, contracts, disabilities and duties of each of the corporations so amalgamated. (The Companies Act, R.S.O. 1927, c. 218, s. 10).

Therefore, when the agreement of 1st November 1929 was entered into by Northern Ontario Power Company, Limited with respondent, it was already under contract to supply respondent with power for the mining life of respondent's properties. This contract was, of course, limited in its duration to a period of ten years, by reason of the provisions of The Public Utilities Act, R.S.O. 1927, c. 249, as that Act has been interpreted and applied by this Court and by the Judicial Committee in the *La Roche* case (*Northern Ontario Power Co. Ltd. v. La Roche Mines Ltd. et al.*, [1937] O.R. 824, [1937] 4 D.L.R. 47, affirmed [1938] 3 All E.R. 755, [1938] 3 D.L.R. 657, [1938] 3 W.W.R. 252), all as set forth in the judgment of the Chief Justice.

The appellants submitted, as one of their alternative submissions, that the agreement of 1st November 1929 established a new contract commencing on the completion of the "change over" for which that contract provided, and continuing thenceforward for the mining life of the properties, but restricted, by force of The Public Utilities Act, to a period of ten years from the completion of the change-over on 15th June 1932. The learned Chief Justice, in dealing with this submission, said that he did not disagree with the proposition that the restrictive pro-

vision of The Public Utilities Act did not prevent the appellant Northern Ontario Power Company, Limited making a contract for the supply of power for a period to commence at some date later than the date of the contract, and to continue for the full period of ten years from the commencement of supply. He continued as follows:—

“Therefore, I appreciate the force of the contention that the supply of power under the agreement of 1929 was not to begin, and did not begin, until the completion of the change-over in 1932, and that the supply during the period November 1, 1929, to June 15, 1932, was not a supply under the agreement of 1929, but under the revised contract of 1928, and, therefore, that the statute did not stand in the way of the effectiveness of the agreement of 1929 during the period June 15, 1932, to June 15, 1942. But after much consideration I have reached the conclusion that the supply and use of power under the agreement of 1929 in fact began with the making of that agreement, and that the statute put an end to the term on November 1, 1939.”

With great respect for the opinion of the learned Chief Justice, it seems to me that, always bearing it in mind that it was an essential part of this submission of the appellants that the contract of 1st May 1928 was to continue in force during the period of the change-over (which turned out to be a period of between two and three years), a further contract made on 1st November 1929 for a period of ten years, commencing on the completion of the change-over, would be beyond the contracting powers of the Power Company. The contract of 1st November 1929, notwithstanding that it may well be open to the interpretation that the supply of power under it is not to commence until a future date, was none the less, at the very moment it was made, a contract for the supply of power. The contract of 1st November 1929, although it is in this respect perhaps in form only a contract to make a contract, was a complete obligation the instant it was made, as pointed out by Lord Wright in the extract that the learned Chief Justice has quoted from the judgment in *Hillas and Co. Limited v. Arcos Limited* (1932), 147 L.T. 503 at 515. The effect given to s. 22 of The Public Utilities Act, both in the Court of Appeal and by the Judicial Committee, is that it imposes a limitation upon the contracting power of the appellants. It would be merely trifling with the statute to permit the appellants to accomplish by two contracts what they

cannot do by one. If such a thing were permissible, having made one contract for ten years, the parties could, after a decent interval, make another contract for a further ten years, to commence at the expiry of the first period. It was said in the course of the argument that to hold otherwise would put such restrictions upon the appellants as would make it practically impossible to assure a continuous supply of power to a mine, for it would be necessary to await the expiration of the period of one contract before making another. I am sure these business men are accustomed to solve more serious practical difficulties than this presents. It is not imperative that the appellants shall, on each occasion, exhaust their contracting power. Contracts can be made for less than ten years, so that some overlapping would be permissible, or a renewal contract may, by its express terms, forthwith put an end to the existing contract, and itself provide for the future supply immediately.

It seems to me to be clear, therefore, that the section of The Public Utilities Act prevented the appellant, Northern Ontario Power Company Limited, while under contract to supply power to respondent for a period that, by their agreement, was still to continue until the completion of the change-over, from entering into a further contract for the supply of power to the respondent, at the same place and for the same purposes, that would continue for the period of ten years from the completion of the change-over. The contract of 1st November 1929, if it is to be regarded as in itself a contract for the supply of power, was, like all the contracts made between these parties, to continue for the mining life of respondent's properties in the Kirkland Lake district, but, in my opinion, by force of the statute, respondent's contracting powers, when making that contract, were restricted to such a period as, when added to the period for which the supply of power was then still to continue under the 1928 contract, would make the full period of ten years from 1st November 1929. In this view, the problem with respect to the time when the supply of power under the contract of November 1929 was to begin, which the learned Chief Justice—not without expressing some doubt—resolved in favour of the respondent, does not arise. The result, however, is the same as that arrived at by the Chief Justice. The contract of November 1929 came to an end in ten years from its date.

I have had more difficulty with a further alternative submission of the appellants to the effect that the parties, by their conduct and dealings from and after the completion of the change-over on 15th June 1932, tacitly entered into a new contract for the mining life of the properties, but, by force of the statute, limited to ten years from 15th June 1932.

In the contract of 1st November 1929, the parties definitely agreed to make a new contract on the completion of the change-over, similar in form and agreement to the then existing contract of 1st May 1928, but providing for a total supply of 12,000 h.p. of 25-cycle power. I do not know that the cases cited by the Chief Justice as to implying terms in a contract, such as *Luxor (Eastbourne), Limited et al. v. Cooper*, [1941] A.C. 108, are wholly applicable when the question is the implication of a whole contract. When the parties have set out the express terms of their contract, it requires the compulsion of some necessity to justify the implication of a term not expressed, but where there is no express contract, and the existence of a contractual relation between the parties is evidenced only by their conduct, what the Court has to do is to place a reasonable construction upon that conduct, and, if the evidence will justify it, to make reasonable implications from it. There is not the obstacle of a memorandum in writing to overcome. However, while there is no doubt that on 1st November 1929, the parties contemplated making a new contract on the completion of the change-over, what they had in mind, and stipulated for, was a formal contract. They were already agreed upon the terms of their future contractual relationship, and its terms were sufficiently defined in the agreement of 1st November 1929. For reasons that we do not know, nothing further appears to have been said or done about the making of a formal contract when the change-over was completed, and the reasonable inference would appear to be that the parties were content to proceed with nothing further in the way of a contract than what was contained in the 1929 agreement. That agreement contained, by reference, all that could possibly be implied from the later conduct of the parties, and, in fact, that is all that is asked. The learned Chief Justice was, therefore, right, in my opinion, in declining to imply a new contract from the conduct of the parties on the completion of the change-over in June 1932.

I am, therefore, of the opinion that the appeal should be dismissed with costs.

FISHER, HENDERSON and GILLANDERS JJ.A. agree with ROBERTSON C.J.O.

LAIDLAW J.A. (*dissenting*):—This is an appeal by the plaintiffs from a judgment (excepting a certain part thereof in favour of the plaintiff Northern Ontario Power Company, Limited) pronounced by the Honourable the Chief Justice of the High Court on 13th April 1943.

The main question to be determined by this Court is whether or not the respondent was bound by contract with the appellants to buy electric power from the appellant Northern Ontario Power Company, Limited and no one else on and after 30th April 1940.

Northern Ontario Power Company, Limited (herein referred to for convenience as the Power Company) was incorporated by letters patent (Ontario) dated December 20, 1928. It is the successor by amalgamation of Northern Ontario Light and Power Company Limited, incorporated by letters patent (Ontario) dated February 23, 1911, (herein referred to as the Light and Power Company) and Northern Canada Power, Limited incorporated by letters patent (Ontario) dated 5th November 1919. Canada Northern Power Corporation, Limited, a Dominion corporation, was incorporated by letters patent dated 9th December 1924, and the other companies named are said to be subsidiaries of it.

On 1st May 1928, an agreement in writing (herein referred to as the 1928 agreement) was made between the Light and Power Company and the respondent (herein sometimes referred to as the consumer). It appears from the instrument that the Light and Power Company is "authorized and requested" by the consumer to connect its electric system with the wiring of the consumer at a described point "and to cause electric power and energy to be there delivered during the period noted or any renewal or continuation thereof as provided. . . ." There is a schedule of prices, and the agreement between the parties is subject to general conditions which provide amongst other things,

1. That the consumer will pay "for service supplied under this contract . . . within fifteen days from the date of receipt

of . . . accounts . . ." and accounts shall be subject to a stated discount for prompt payment if made within fifteen days after date of accounts and to interest at the rate of 7 per cent. per annum from sixty days after the date of accounts, if not paid within this period.

"6. [as numbered in the contract] "During the continuance of this contract, no system of electricity other than that furnished by the Company shall be used in said premises, providing Company is able and ready to supply same, except with the written consent of the Company. . . ."

"12. . . . at any time the Consumer does not take the power or energy he is obligated to take hereunder, the readiness of the Company to deliver the said power or energy as evidenced by maintenance of normal voltage and frequency, . . . at the point of delivery shall constitute a valid tender of the same."

13. The benefits and obligations of the contract shall inure to and be binding on the successors, of the parties.

15. The consumer is to be given the benefit of the reduced price to others in case the price for similar service, and equal or smaller amounts of power, to that used by the consumer, be reduced by the company or any other company controlled by the Canada Northern Power Corporation, Limited.

Under the heading "Special Conditions" it is set forth that the point of delivery is "at outside wall of Consumer's Transformer House", and the nature of the supply is "2,200 volts, 3 phase, 60 cycles (and 11,000 volts, 3 Phase, 25 Cycles.)" The amount of power covered by the agreement is shown as follows:

"Consumer shall be entitled to receive 6,000 H.P. of 60 cycle power under this agreement, this amount may be increased from time to time providing the Company agrees to supply same in writing."

In the same words the consumer is entitled to receive 6,000 h.p. of 25 cycle power, which may likewise be increased.

The period of the contract is worded:

"This agreement when executed shall extend for the mining life of the properties now or hereafter operated or owned or controlled by the Consumer in the Kirkland Lake district."

The instrument is executed under seal of the consumer, and the "acceptance of Company" is also evidenced under its seal and the signatures of its officers.

Below the space bearing the signatures and seals of the consumer and the Light and Power Company is the following:

"Canada Northern Power Corporation Limited, hereby intervenes to guarantee the performance of this contract by Northern Ontario Light and Power Company, Limited." And thereafter the seal and signatures of officers of Canada Northern Power Corporation, Limited (the same as for the Light and Power Company) are affixed.

The Light and Power Company and the Northern Canada Power, Limited amalgamated by agreement between the parties dated October 1, 1928, and letters patent dated December 20, 1928, confirmed the joint agreement for amalgamation of the two companies as a corporation under the name of Northern Ontario Power Company, Limited (the Power Company).

On 1st November 1929, the Power Company and the respondent made an agreement in writing (herein referred to as the 1929 agreement) in which it is recited that the Power Company "now supplies the Customer [*i.e.*, the respondent] with electrical power . . . and the Customer has agreed to permit the Company to change over all existing 60 cycle, electrical equipment installed, or used, on the Customer's said mining property, to 25 cycle, electrical equipment. . . ." Clause 11 of this agreement reads:

"11. IT IS FURTHER UNDERSTOOD AND AGREED BETWEEN THE parties hereto, that upon the completion of the change over from 60 cycle to 25 cycle equipment covered by this contract, the Customer shall enter into a new electrical contract similar in form and agreement with the present existing contract between the parties hereto, dated the first day of May, 1928, but such new contract shall provide for a total supply by the Company to the Customer of 12,000 Horsepower 25 cycle power supply."

The change-over from 60 cycle to 25 cycle electrical equipment was completed June 15, 1932, but no instrument to evidence "a new electrical contract" between the parties was prepared or executed after that date.

The Power Company continued to supply, and the respondent continued to receive, power without interruption, but on 31st January 1940, the respondent sent to the Power Company a registered letter reading: "We are writing to advise you that we will not require to be supplied with electrical power by you from and after April 30th, 1940."

On 21st February 1940, the respondent and The Hydro-Electric Power Commission of Ontario (herein referred to as the Commission) entered into an agreement, in writing, for the supply of power required by the respondent. The respondent agreed amongst other things "to take power exclusively from the Commission . . ." and it was expressly provided that in the event of the Power Company bringing an action against the respondent "by reason of the Customer [the respondent] discontinuing to take power from the said Company" (*i.e.* the Power Company); or obtaining a final judgment declaring the contract dated 1st May 1928, to be a valid, subsisting, and binding contract; or that the customer (*i.e.* the respondent) "is in law bound to take and pay for power supplied by the said Power Company"—the respondent might terminate the agreement.

On 3rd April 1940, the plaintiffs issued a writ of summons and asked for:

"(a) A declaration that the Defendant is not entitled to terminate on 30th April, 1940, the supply by the Plaintiff Northern Ontario Power Company Limited to it of electric power and energy for use in its mining properties in the Kirkland Lake District of Ontario and that the Defendant is not entitled to use on and after that date power and energy from the Hydro Electric System or any system other than that of the Plaintiff Northern Ontario Power Company Limited;

"(b) An injunction restraining the Defendant from changing over its power supply from the system of the Plaintiff Northern Ontario Power Company Limited to the Hydro Electric system or any other system; and from using any electric power and energy supplied from any system other than that of the Plaintiff Northern Ontario Power Company Limited;

"(c) A direction, pursuant to section 17 of the Judicature Act, that damages shall be ascertained in such manner as the Court may direct for the use by the Defendant of electric power and energy from the Hydro Electric system, from 30th April, 1940, until the service of Northern Ontario Power Company Limited has been restored; and such other relief under said section as the Court may deem just;

"(d) An accounting of the amount due by the Defendant to the Plaintiffs for power supplied, with interest, and payment by the Defendant of the amount found due;"

An application to the Honourable the Chief Justice of the High Court, made on 18th April 1940, for an interim injunction was dismissed. Subsequently, by an arrangement made entirely without prejudice to the rights of either party, the Power Company opened the circuit breaker in the electrical system, on 30th April 1940. The respondent then ceased to take any power from the Power Company and was supplied thereafter by the Commission.

The learned Chief Justice allowed the Power Company the unpaid portion of the price of the power actually used by the respondent in the period October 1939 to April 1940 inclusive, together with interest computed in a stated manner, but in all other respects the action of the plaintiffs was dismissed.

The ground of appeal first argued in this Court was that the Light and Power Company had full capacity to enter into a contract with the respondent "for the life of the mine"; that the Light and Power Company was not a company "incorporated for the purpose of supplying any public utility" within the meaning of section 53 of The Statute, 3-4 Geo. V. c. 41, *infra*; that the Power Company, having succeeded by amalgamation to all the rights of the Light and Power Company, was entitled to enforce all the rights given to the Light and Power Company by the contract of May 1, 1928; and that that contract was not affected by s. 22 of The Public Utilities Act, R.S.O. 1927, c. 249.

The point to be considered is whether the statutory provisions in s. 22, or its predecessor section, of The Public Utilities Act applies to and affects the period of the contract as set forth in the 1928 agreement, *viz.*, "This agreement when executed shall extend for the mining life of the properties now or hereafter operated by the Consumer. . . ."

It is necessary to examine the legislation. In 1913 a statute was passed entitled "An Act respecting the Construction and Operation of Works for supplying Public Utilities by Municipal Corporations and Companies" (3-4 Geo. V., c. 41).

I quote relevant sections and parts thereof as follows:

"2. In Parts . . . V . . . of this Act, 'Public Utility' . . . shall mean . . . electrical power or energy. . . ."

"23. The Corporation may from time to time, and upon such terms as may be deemed advisable, enter into contracts for the supply of a public utility to any person for any period not exceeding ten years."

“Part V.

“All company public utilities.

“53. This Part shall apply to every company heretofore or hereafter incorporated for the purpose of supplying any public utility.

“58. The provisions of sections . . . 23 shall, *mutatis mutandis* apply to a company.”

The Light and Power Company was incorporated in 1911 before the passing of the statute above quoted. But nevertheless, by virtue of s. 53, Part V, relating to “All company public utilities” is applicable to the Light and Power Company if that company was incorporated “for the purpose of supplying any public utility.”

Purposes and objects for which the Light and Power Company was incorporated appear in the letters patent and include the following, amongst other things: “(a) To manufacture, buy, sell, and deal in goods, wares and merchandise of all kinds; “(b) To manufacture [and] generate . . . electricity and all other kinds of power and to sell, dispose of, distribute and deal in the same;”

The purpose and object as contained in clause (b) quoted unquestionably falls within the statutory definition of “public utility” and Part V of the “Act respecting . . . Operation of Works for supplying Public Utilities by . . . Companies.” The fact that such object and purpose is not placed first in the enumeration of objects in the letters patent does not make it a secondary or incidental purpose or object. S. 53 cannot be restricted in its meaning and application to companies incorporated for the sole and exclusive purpose of supplying a public utility. It is sufficient to bring a company within the operation of that section if that be one of its purposes. It would be manifestly contrary to the intention of the legislation if the operation of the section could be avoided by including in the corporate powers of a company, created for supplying public utilities, other purposes and powers not of the kind within the statutory definition of public utilities. Such a device would enable a company likewise to defeat the application and effect of the provision in s. 23 whereby a company may “enter into contracts for the supply of a public utility to any person for any period not exceeding ten years.” A company whose purposes and objects are not limited could make a contract for the supply of a public utility for a

period exceeding ten years, but a company whose purpose and object is limited would be unable to do so. It is my view that a company possessing the power to operate a work for the supply of a public utility is within the provisions of the statute whether that power be the sole power or included with others and whether it be the principal or a secondary power. If the company exercise that power and enter into contracts for the supply of a public utility to any person, it is controlled and governed by the provisions in s. 23.

The provisions quoted above from the statute 3-4 Geo. V., c. 41, are found in The Public Utilities Act, R.S.O. 1927, c. 249, in force on 1st May 1928, and s. 22 thereof corresponds with s. 23 of the first Act. Therefore, it was applicable to the 1928 agreement, and also to the 1929 agreement. If it were not for binding authority, much might be said in support of the view that the provision in s. 22 is enabling legislation intended to extend and confer wider powers on a corporation and company than it possessed when the statute first came into effect. But in *Northern Ontario Power Co. Ltd. v. La Roche Mines Ltd. et al.*, [1937] O.R. 824, [1937] 4 D.L.R. 47, affirmed [1938] 3 All E.R. 755, [1938] 3 D.L.R. 657, [1938] 3 W.W.R. 252, Lord Russell of Killowen, at p. 760 (All E.R.), says, ". . . the contract, and with it the obligation, would come to an end with the expiration of 10 years from the date of the contract. . . . [Their Lordships] see no reason for holding either that the capacity of the power company to contract for the supply of a public utility is not by the sections restricted to a period not exceeding 10 years, or that a contract which purports to, or which may on its terms, extend beyond that period is not valid and binding during the period." The date of the contract under consideration in that case was 30th December 1931, and power was supplied thereunder from 17th January 1932. It was decided that by virtue of ss. 22 and 59 of The Public Utilities Act the duration of the contract must be limited to ten years from 30th December 1931, and that the La Roche company was not under obligation after 30th December 1941. The contract was held to be valid for a period of years commencing on the date of the contract, although the supply of power did not in fact commence until a later date, viz., 17th January 1932. But I do not read the reasons for judgment to include a decision that a power company cannot, under any circumstances, make a contract with a consumer on a stated date, for

a supply of power for a period binding in law for ten years from a future fixed date. If that were so, a power company in the course of promotion or construction could not make a contract with a prospective customer for a period of supply for ten years, whereas a power company in production could do so. A person requiring power in the future could not bind a power company for a period of ten years from the date the supply was first needed, but only from the date of an agreement, and thus, to ensure a supply of power for the full period of contract permitted by the statute, must postpone the making of an agreement until ready to take delivery. Again, a power company serving a customer under a contract could not, during the currency of it, agree to extend the term of it from its termination, but only for ten years from the date of such agreement to extend it. In such cases, in order to provide for the longest period of supply, the power company and its customer must postpone the making of an agreement until the power can be actually delivered, and in the case of delivery being made under a current contract, until the term thereof expires. Such a construction of s. 22, I think, is unreasonable and impracticable, and was not intended. In my view, the limitation on the period, as contemplated by the Act, runs from the date the supply of power commences under a contract, and the obligations of the parties end ten years after that date. No decision to the contrary forms part of, or was necessarily included in, the judgment referred to. I agree with the view of the learned Chief Justice that "it would be quite within the power of a power company to agree with a prospective customer that when he had constructed a plant which was to be operated by electrical power, the company would for a period of ten years supply him with the requisite power." Also "It is not correct . . . to say that the statute necessarily deprives a power company of the right to contract effectively to supply power for a period of ten years beginning in the future."

Counsel for the appellant argues that, under the 1929 agreement, the period of the contract relating to supply of power commenced on 15th June 1932, and continued thereafter for ten years, until 15th June 1942. It was further argued, in the alternative, "that the parties, by their conduct and dealings from and after 15th June 1932, tacitly entered into a new contract, running for the mining life of the properties (but by force of the statute, not beyond 15th June 1942)"; and that "the new con-

tract running from 15th June 1932, was 'similar in form and agreement with' the contract of 1st May 1928, but would be for a total supply of 12,000 h.p. 25-cycle power."

It is permissible and necessary, I think, to examine the surrounding circumstances within the knowledge of the parties at the time the 1929 agreement was executed. Prior to that date the Light and Power Company amalgamated with Northern Canada Power, Limited; the power company came into existence: the parties contemplated a change-over from 60-cycle equipment, previously installed and then existing on the respondent's property, to 25-cycle equipment, and an increase from 6,000 h.p. of 25-cycle power, as provided by the 1928 agreement, to 12,000 h.p., together with discontinuance of the use of all 60-cycle power. It was important to the respondent that during the period of "change over" from 60-cycle to 25-cycle equipment there should be no interruption in the supply of power, both kinds in varying amounts being necessary until the change-over was completed.

In my opinion, the objects and purposes of the agreement dated 1st November 1929, are (1) to provide for the "change over" in equipment, as described, and (2) to provide for the supply of power by the Power Company to the respondent after completion of the change-over.

Counsel for the respondent contends that the 1929 agreement contains the complete obligations of the parties, and "is protection of the supply of power to the respondent from the time of signing." He says a new contract was made on 1st November 1929; that three objects were accomplished: (1) to keep alive portions of the 1928 agreement; (2) to provide for the change-over; and (3) to provide for costs. He urges that from 1st November 1929 there was a continuous obligation on the part of the Power Company to supply, and on the part of the respondent to take, power "for the life of the mine." The learned Chief Justice held, after much consideration, "that the supply and use of power under the agreement of 1929 in fact began with the making of that agreement and that the statute put an end to that term on November 1, 1939." He says, "I think—although I confess that I am not free from doubt—that the agreement of 1929 does by necessary implication amount to a contract for the supply of a public utility during the period preceding the completion of the 'change over' . . . and that the agreement ought

to be treated as a contract for the supply of a public utility for a period beginning in 1929, and, as a result of the statute, ending in 1939. It is a border-line case."

With great respect, I cannot agree with the views of the learned Chief Justice. I think there is no "necessary implication" from the agreement of 1929, as found by him. I see no sufficient reason to treat the 1929 agreement as creating obligations commencing on that date as to the supply of power during the period preceding the completion of the change-over. The obligations of the parties under the 1928 agreement were not expressly terminated on 1st November 1929, and I think such termination on that date cannot be implied. The obligations as to 60-cycle and 25-cycle continued under the 1928 agreement until the change-over was complete, *i.e.*, throughout the period 1st November 1929 to 15th June 1932. During that period there was to be no interruption or interference with the supply of power, and likewise the terms and conditions pertaining thereto were not interfered with or affected by the 1929 agreement. It was only after the new installation of equipment was fully complete that a new period of supply of power commenced. There was then a new obligation created for the supply of a new block of 12,000 h.p. of one kind, *viz.*, 25-cycle, in place of two blocks of power of different kinds supplied theretofore.

There is nothing in the 1929 agreement inconsistent with the view that the 1928 agreement continued to be in force, and that the supply of power continued to be under the terms and conditions thereof until the change-over was completed. I think it would be the reasonable, business-like and practical arrangement to maintain the existing obligations of the parties as to the supply of power during that period, and under the circumstances, to fix a new starting point on the date the parties were ready to operate under changed conditions of plant, enabling the Power Company for the first time to supply, and the respondent to take, 12,000 h.p. of 25-cycle power.

Clause 11 of the 1929 agreement uses the words "the Customer shall enter into a new electrical contract similar in form and agreement with the present existing contract between the parties hereto, dated the first day of May, 1928". It will be observed that the parties refer to "the present existing contract . . . dated the first day of May 1928". If that contract continued to exist after 1st November 1929, and power was supplied

under it pending the change-over, the period of supply of power under the 1929 agreement did not commence until 15th June 1932. The obligations as to the supply of power in that period did not exist under both agreements.

I think the words quoted above from clause 11 do not mean that the parties agree to negotiate a new contract upon completion of the change-over. They refer, I think, to the act of executing a document "similar in form and agreement" to the document dated 1st May 1928. There were no new terms or conditions left open for future agreement or understanding. The parties were of one mind as to the terms and conditions relating to the new block of power. It remained only for the parties to prepare an instrument setting forth the terms and conditions, and the execution thereof, upon completion of the change-over. The fact that such an instrument was not prepared or executed cannot alter the contractual obligations of the parties. The relationship between them must be considered as if those acts had been done which ought to have been done. Thus, if the proper instrument had been prepared and executed by the parties, as contemplated, I think there can be little doubt that the period of contract expressed therein would run, and be enforceable, for ten years from 15th June 1932.

The alternative argument of appellant's counsel that a contract was tacitly created from and after 15th June 1932, by the conduct and dealings of the parties, and that the period of such contract was "for the mining life of the properties (but, by force of the statute, not beyond 15th June 1942)" need not be discussed by me at length, because of the views I hold as to the obligations of the parties created by the 1929 agreement. It may be said, however, that, in my opinion, the conduct of both parties was consistent with an agreement for the supply of 12,000 h.p. of 25-cycle power on the terms and conditions contained in the 1928 agreement, and for a period commencing 15th June 1932, and ending, by force of law, 15th June 1942. Whether the respective obligations of the parties arise by virtue of the 1929 agreement, or under a contract implied by law, the date of commencement of such obligations is 15th June 1932, and the date of ending, 15th June 1942.

The Power Company was able and ready, during that period, to supply the power requirements of the respondent, and it did not give the respondent its consent to use power furnished by

any other company. No system of electricity other than that furnished by the Power Company could be lawfully used on the premises of the respondent during that time. It follows that the respondent discontinued taking power from the Power Company, on 30th April 1940, without right so to do, and in violation of its contractual obligations then existing.

Appellants' counsel urged the Court to hold that a new contract for the mining life of the properties (but by force of statute not extending beyond 1st May 1948) should be inferred from the conduct and dealings of the parties from and after 1st May 1938. It is emphasized, *inter alia*, that the Power Company continued to supply, and the respondent to take, power, without interruption: that monthly accounts were rendered by the Power Company with amounts computed at rates "applying to standard contracts"; that for a period from 16th May 1938 to 16th January 1939 the respondent made payment of the accounts as rendered; between 15th February 1939 and 16th October 1939, the accounts were "paid under protest" by the respondent; subsequently the respondent claimed a discount as computed by it, under the provisions of the 1928 agreement; and that discussions and correspondence were had as to the proper method of billing. Other acts of the parties were also discussed in detail by counsel with a view to showing that a contract extending to 1st May 1948 should be inferred by law. But there is no evidence from which the Court can infer from the conduct of the parties after 1st May 1938, that they both intended their obligations as to the supply of power to continue for the mining life of the properties. The acts and dealings of the parties do not make it a necessary conclusion that the period of obligations should continue for that length of time or for any period. "Implied terms . . . can only be justified under the compulsion of some necessity": Per Lord Russell of Killowen in *Luxor (Eastbourne), Limited et al. v. Cooper*, [1941] A.C. 108 at 125, quoted by the learned Chief Justice. I think there is no "compulsion of some necessity" to infer that the parties intended any period of supply to form part of their dealings with one another. The Power Company supplied power to the respondent, and the respondent accepted and used it. In the absence of any express agreement, the delivery of the power by the Power Company to the respondent would be a proposal of a contract. The taking of the power by the respondent would constitute an acceptance of such proposal. But it does not

follow that such proposal included a term requiring the respondent to continue taking power for the mining life of its property. That implication does not "arise inevitably to give effect to the intention of the parties." *Luxor (Eastbourne), Limited v. Cooper; supra*, at p. 137. The burden of proof is upon the appellants to show that a promise on the part of the respondent to take power from the appellants for the mining life of the properties of the respondent (but limited by statute to a period of ten years) ought to be implied by law, from the conduct of the parties from and after 1st May 1938. I think that burden has not been discharged and the appellants' argument on this ground of appeal cannot succeed.

I consider the relief sought in the action by the Power Company. For reasons given above, I have endeavoured to make plain my view that the respondent was not entitled, on 30th April 1940, to terminate the supply by the Power Company to it, of electric power and energy for use in its mining properties in the Kirkland Lake district of Ontario; and was not entitled to use on and after that date power and energy from the Hydro-Electric System or any system other than that of the Power Company. But I think a declaration thereof by the Court is not necessary to give adequate relief to the plaintiffs in this case.

The prayer for an injunction need not now be considered. But under s. 17 of The Judicature Act, R.S.O. 1937, c. 100, the Court may award damages to the appellants and give directions as to the manner in which they may be ascertained. The facts and the principle upon which the amount of damages is to be determined must be first considered and discussed. On 7th November 1933, the Power Company (and others) made an agreement in writing with The Hydro-Electric Power Commission of Ontario for the purchase by the Power Company from the Commission, on terms and conditions set forth, of amounts of power therein particularly described. The Power Company agreed to pay the Commission for all power under the agreement in monthly payments at rates set out in a schedule. The price payable by the Power Company per horse-power depended upon the total power taken by the Power Company, e.g., "Thirty-two Dollars and Fifty Cents (\$32.50) per horsepower per year for all power up to five thousand horsepower (5000 H.P.). Twenty-two Dollars and Fifty Cents (\$22.50) per horsepower per year for all power over Five Thousand horsepower (5000 H.P.) and

up to Ten Thousand horsepower (10,000 H.P.)." The monthly payments were to be based on the monthly demand as determined in the manner described in the agreement. In addition to the rates stated, the actual cost per horse-power to the Power Company was increased due to losses in operating efficiency. The power purchased by the Power Company from the Commission was 25-cycle power, and was delivered to a sub-station at Kirkland Lake where other power of the same kind but generated by the Power Company itself was also delivered for distribution. In other words, 25-cycle power available to the Power Company by purchase or generation by it came to the sub-station at one point known as "a common bus." It is admitted that "a great portion" of the power delivered to the respondent by the Power Company came originally from the Commission into the common bus. This is illustrated by a comparison of the total amounts of power purchased by the Power Company from the Commission during the period just before the respondent discontinued taking power from the Power Company (30th April 1940) and immediately after that date. I quote from the evidence of Mr. B. V. Harrison, general manager of the Power Company, the amounts of such horse-power, as follows:

"February 56,093; March 55,819; April 53,673; May—the Lake Shore load was off then—we dropped to 43,786; June 42,893; July 40,482; August 42,316; September 43,347; October 45,181; November 47,000." But it is stated by Mr. Harrison that the "total takings from the Hydro did not decrease by the total amount the Lake Shore took from us. In other words, we were selling approximately 12,000 horsepower to the Lake Shore. When they discontinued taking power from us our Hydro takings did not decrease by 12,000 horsepower; because this power was all pooled on our system, and some of it came from our own system, our own power plants, to the Lake Shore."

The appellants were ready to deliver power to the respondent on and after 30th April 1940, and up to 15th June 1942; and there was a valid tender of such power constituted by the maintenance by the Power Company of usual voltage and frequency at the point of delivery (requiring only the connection of cables), as provided in the 1928 agreement.

Counsel for the appellants argues that they are entitled to recover from the respondent the purchase price of all power taken by the respondent from the Commission after 30th April

1940 to the time when the contractual obligation of the appellants with it ended, and at the rates provided in the 1928 agreement. Respondent's counsel contends that the actual cost to the appellants, of all the power the appellants would have purchased from the Commission and thereafter delivered to the respondent, should be taken into account. I accept the respondent's argument. The general rule in awarding damages is that the law will endeavour, so far as money will do it, to place the injured person in the same situation as if the contract had been performed: *Robinson v. Harman* (1848), 1 Ex. 850 at 855, 154 E.R. 363, referred to in *Abrahams et al. v. Herbert Reiach, Limited*, [1922] 1 K.B. 477 at 480. In case a buyer of goods wrongfully neglects to accept and pay for them, the seller may maintain an action against him for damages for non-acceptance. The measure of damages is the estimated loss directly and naturally resulting from the buyer's breach of contract: The Sale of Goods Act, R.S.O. 1937, c. 180, s. 48(2). It is my opinion that electrical power may be considered as goods (See Curtis, The Law of Electricity, p. 6), and damages for non-acceptance of it in breach of contractual obligations may be measured in the manner stated.

I would direct a reference to the Master of the Supreme Court of Ontario to make all necessary inquiries and to take all necessary accounts to ascertain:

(1) The amount of power taken by the respondent from The Hydro-Electric Power Commission of Ontario each and every calendar month from and on 30th April 1940, to and including 14th June 1942.

(2) The sums payable by the respondent to the Northern Ontario Power Company, Limited each and every of the said months for the amounts of power so taken, computed without discount at the rates applying from time to time to standard contracts under which power was supplied by the Power Company during the said period.

(3) The amount payable by the respondent to the appellants for interest on the sums, computed as aforesaid, for each and every of the said months at the rate of 7 per cent. per annum from sixty days after the first day of the months following the month in which power was taken by the respondent, to the date of judgment.

(4) The total sum payable for power and for interest, both computed as aforesaid.

(5) The amount of power the Power Company would in the ordinary course of events have taken from The Hydro-Electric Power Commission of Ontario for the purpose of supplying all the power requirements of the respondent during each and every of the said months, if the respondent had not discontinued taking power from the Power Company on 30th April 1940.

(6) The sums which the Power Company would have had to pay to the Commision for the said amounts of power during each and every of the said months, including in such sum any increased cost to the Power Company by reason of losses in operating efficiency.

(7) The total sum which the Power Company would have had to pay to the Commission as aforesaid.

(8) The difference between the total sum payable by the respondent to the Power Company for power and interest and the total sum which the Power Company would have had to pay to the Commission during the whole of the said period.

The Power Company is entitled to recover from the respondent the sum found by the Master to be the difference as aforesaid. This sum is, of course, in addition to the sum of \$49,361.90 payable by the respondent to the Power Company under the judgment of the Honourable the Chief Justice. The appeal of the Power Company should, in my opinion, be allowed with costs and the judgment of the Honourable the Chief Justice ought to be varied by directing a reference to the Master as herein provided, and that the plaintiff Northern Ontario Power Company, Limited recover from the defendant the sum found by the Master in the manner described to be payable by the respondent to the said plaintiff.

Counsel on behalf of the appellant Canada Northern Power Corporation, Limited argued that the said corporation, having been incorporated under the laws of the Dominion, is not subject to the provisions of The Public Utilities Act, a provincial statute, and in consequence is entitled to have the obligations of the respondent performed for the period of "the mining life of the properties". I think this argument cannot succeed. There are no reciprocal obligations contained in the 1928 agreement, as between the Canada Northern Power Corporation, Limited and the respondent. The respondent could not call upon the

Canada Northern Power Corporation, Limited to perform any obligations apart from what was undertaken by the Light and Power Company. I agree with the Honourable the Chief Justice that "the undertaking being on its face with the Light and Power Company and not with the Power Corporation, the Power Corporation did not obtain the right to enforce it." The appeal of Canada Northern Power Corporation, Limited should therefore be dismissed, without costs.

*Appeal dismissed with costs, LAIDLAW J.A.
dissenting in part.*

*Solicitors for the plaintiffs, appellants: Kilmer, Landriau,
Rumball, Gordon & Beatty, Toronto.*

*Solicitors for the defendant, respondent: Slaght, Ferguson
& Carrick, Toronto.*

[PLAXTON J.]

Attorney-General of Canada v. Wheeler.

War Measures—Validity of Regulations—Provisions for Forfeiture—Interpretation of Terms—“Foreign Security”—The Foreign Exchange Control Order and Regulations, Order in Council 2716/1939.

Penalties and Forfeitures—Power of Court to Relieve—Inapplicability to Statutory Forfeitures—Equitable Nature of Remedy—Defendant’s Conduct—The Judicature Act, R.S.O. 1937, c. 100, s. 18.

S. 8 of The War Measures Act, R.S.C. 1927, c. 206, which provides for the forfeiture of “any goods, wares or merchandise” dealt with in contravention of orders or regulations made under the authority of the Act, is a purely enabling section, and there is no inconsistency between this section and a provision in an Order in Council made under s. 3 of the Act (in this instance, s. 40(2) of The Foreign Exchange Control Order and Regulations, P.C. 2716/1939) providing for the forfeiture of things not specified in s. 8. The powers of the Governor in Council under s. 3, which come into play only during a time of great emergency, are of the most sweeping character, and must be most liberally construed. This principle of construction applies also to orders and regulations made under the authority of that section. *In re Gray* (1918), 57 S.C.R. 150; *Spitz v. The Secretary of State of Canada*, [1939] Ex. C.R. 162 at 166, applied.

In a proceeding for the forfeiture of certain share warrants which the defendant had illegally imported into Canada, *held*, since the share warrants fell within the words of s. 40(2) of the Order, it was immaterial whether or not they also fell within the words “goods, wares or merchandise” in s. 8 of the Act. If they were within the words of the Act, forfeiture might be ordered under that section, whereas if they were not within the words of s. 8, s. 40(2) of the Order, which was validly made in the exercise of the powers granted by s. 3 of the Act, came into play, and equally authorized the forfeiture.

Held, further, s. 18 of The Judicature Act, R.S.O. 1937, c. 100, enabling the Court to relieve against penalties and forfeitures, could not avail the defendant. It had been held, in *The King and The Provincial Treasurer of Alberta v. Canadian Northern Railway Company et al.*, [1923] A.C. 714, that such a provision did not apply to a statutory forfeiture. Further, this power of the Court was an equitable one, and even if it extended to such a forfeiture as was here in question, the defendant’s conduct in this case was not such as to place him in a favourable position before a court of equity.

AN action for the forfeiture to His Majesty of certain securities which, it was alleged, the defendant had illegally imported into Canada.

31st May 1941. The action was tried by PLAXTON J. without a jury at Welland.

F. W. Griffiths, K.C., for the plaintiff.

A. L. Brooks, K.C., for the defendant.

6th June 1941. PLAXTON J. (orally):—In this action there is no dispute as to the facts. No evidence was given by or on behalf of the defendant. The only evidence adduced was that of witnesses called on behalf of the Crown. These witnesses were: William F. Horton, senior customs officer of the customs

staff at Fort Erie; Thomas R. Marshall, customs officer at Fort Erie; Constable Allen of the R.C.M.P., in charge of the R.C.M.P. detachment at Fort Erie; and Leo H. Dorfman, of the firm of MacDonald and Bunting, Toronto. The facts established by the evidence of these witnesses are:

On or about 29th August 1940, an officer or employee of the Buffalo branch of a prominent firm of New York stockbrokers called by telephone Messrs. MacDonald and Bunting, stockbrokers of Toronto, and said that they were sending over to them a gentleman named Wheeler, who was a resident of Canada and a prospective client.

On 29th August, on the instructions of Wheeler, MacDonald and Bunting sold 200 shares of International Petroleum. The proceeds of the sale amounted to \$2,942.47. Wheeler gave them, as his address, the McLeod House, Ridgeway, Ontario. He told Dorfman that he was in the real estate business and wanted to have cash in order to purchase certain options on small parcels of land in that locality. Dorfman says that his firm introduced Wheeler to their bankers, and presumably he cashed the cheque for the amount to which I have referred.

On 9th September, Wheeler called MacDonald and Bunting by telephone from Buffalo, and instructed them to sell 700 shares of International Petroleum. The sale was confirmed by telephone. Wheeler said that he would deliver the share certificates to them on 11th September, in the early part of the afternoon. Again he said that he would like cash. MacDonald and Bunting accordingly sold 700 shares of International Petroleum and received therefor \$11,819.12.

It may be mentioned here that there was at the time a difference of four to five points between the list price of International Petroleum on the Toronto stock exchange and the list price of that stock on the New York stock exchange—the Toronto price being higher. This is an indication of Wheeler's motive in arranging these transactions.

On 11th September, about 10.30 a.m., Wheeler arrived by motor car at the Canadian customs end of the Peace Bridge. The customs authorities there had been furnished, through the R.C.M.P. at Fort Erie, with a look-out or stop order for Wheeler. The immigration officer brought Wheeler to the main office of the customs department at the Peace Bridge, where he was interviewed by Mr. Horton, who asked Wheeler if he had imported

or attempted to import, or had exported or attempted to export, any securities, and Wheeler said "No." Horton then said, "I have a stop order for you and you will have to wait until I can arrange to have the R.C.M.P. officer come over." About twenty minutes later Constable Allen arrived. Horton then instructed Customs Officer Marshall to search Wheeler's motor car, which was at the fence, some one hundred feet away. Customs Officer Marshall and Constable Allen, accompanied by Wheeler, proceeded to the motor car. Marshall asked Wheeler whether he had any securities in his possession, and only then did Wheeler produce from his pocket a bundle of share warrants of International Petroleum, representing 700 shares.

When Wheeler was informed that he would be held in detention, he said that the matter must have something to do with the securities he had sold in Toronto previously. Wheeler told Marshall that he had taken the share warrants out of a safety deposit box at Buffalo that morning, that he was going to visit his sister at Port Albino, and that he would be returning in the evening to Buffalo, taking the securities back with him.

Constable Allen took Wheeler over to his office, and called up Toronto for instructions. As a result, Wheeler was arrested. He was afterwards charged with and convicted of offences under s. 39(b) of the Foreign Exchange Control Order and Regulations and was fined in the sum of \$2,100, being \$2,000 on one count and \$100 on another.

In these circumstances, the Attorney-General of Canada, suing on behalf of His Majesty the King, asks for a declaration that these share warrants, representing 700 shares of International Petroleum Company Limited, be forfeited to His Majesty the King, on the ground that they were imported into Canada contrary to the provisions of the Foreign Exchange Control Order and Regulations, Order in Council 2716/1939, 73 Canada Gazette, 915.

The basic provision on which the Crown relies is s. 22(1). That subsection reads:

"No person shall import any goods, currency, securities or other property into Canada except under and in accordance with the terms of a license granted by the Board; provided that this subsection shall not apply to any property which has been shipped to Canada from the country of export prior to the date on which this Order comes into force."

It is alleged by the statement of claim that the defendant did import 13 share warrants, representing 700 shares of the capital stock of International Petroleum Company Limited, contrary to the Order; in other words, that he had no licence to import them into Canada.

S. 40(2) of the same Order in Council provides:

"In addition to any other penalty, if any person, contrary to the provisions of this Order, exports or attempts to export from Canada any goods or other property, or imports or attempts to import into Canada any goods or other property, or buys or sells or otherwise deals with or attempts to buy or sell or otherwise deal with any foreign exchange or foreign securities, or fails to declare any foreign exchange or foreign securities, such goods or other property may be seized and detained and shall be liable to forfeiture, at the instance of the Minister of Justice, upon proceedings in the Exchequer Court of Canada or in any superior court."

These proceedings have been authorized in writing by the Minister of Justice. His authorization is Ex. 1.

In my opinion these share warrants do come within the description of "goods or other property" within the meaning of that subsection, and also within the description of "foreign securities" as defined by s. 2(g) of that Order, in that they are "securities which are not payable, or any dividends or interest on which are not payable, or the principal amount of which is not expressed, exclusively in Canadian dollars." These share warrants are not expressed to be payable in any dollars, still less exclusively in Canadian dollars. In my opinion, having regard to the definition of "securities", in para. (l) of s. 2 of the Order, they fall within the description of "foreign securities."

Mr. Brooks, acting on behalf of the defendant, attacks the validity of the regulations on the ground that s. 8 of The War Measures Act, R.S.C. 1927, c. 206, provides exhaustively for forfeitures for any breach of an order or regulation made under authority of that Act, and that share warrants do not fall within the description of the relevant words of that section, that is, "any goods, wares or merchandise". It seems to me that Mr. Brooks's contention places him on the horns of a dilemma. Assuming that he is wrong in that contention and that the right view is that these share warrants do fall within the description of "goods, wares or merchandise", then *cadit quaestio*, this proceeding is a

proceeding of the very character contemplated and authorized by that section. On the other hand, assuming that he is right in his contention, namely, that these share warrants do not fall within the description of "any goods, wares or merchandise", what possible repugnancy or conflict is there between that section and the regulations made by the Governor in Council under the authority of s. 3, prescribing, by way of penalty for the breach of a regulation, the forfeiture of something which is not within the connotation of the words "goods, wares or merchandise" in s. 8? In my opinion, there is obviously none. That section, it is to be observed, is, in point of form, purely enabling. It simply provides that the things therein specified, if used or moved or dealt with contrary to any order or regulation made under the Act "may be seized and detained and shall be liable to forfeiture" in accordance with the procedure therein prescribed. It does not provide that the things so specified, and those things only, may be made liable to forfeiture for breach of any such order or regulation; and therefore, not inconsistently with that section, the Governor in Council may, in my view, competently provide by order or regulation made in execution of the powers conferred by s. 3 of the Act, for the forfeiture of things not specified in s. 8, by way of penalty for the breach of any such order or regulation.

Moreover, the powers of the Governor in Council under s. 3, coming into play as they do during a time of great emergency, are of the most sweeping character, and are certainly to be most liberally construed. That principle of construction applies as well to regulations made under the authority of that section.

Upon that point, it is perhaps sufficient for me to refer to passages in the judgments rendered by the majority of the Supreme Court of Canada in the case of *In re Gray (Grey)*, 57 S.C.R. 150, 42 D.L.R. 1, [1918] 3 W.W.R. 111, where the learned members of the Court were called upon to deal with the interpretation of what was then s. 6, (now s. 3) of the War Measures Act, 1914, c. 2. At pp. 158-9, Fitzpatrick C.J. says:

"It was also urged, at the argument, that the powers conferred by s. 6 were not intended to authorize the Governor-in-council to legislate inconsistently with any existing statute, and particularly not so as to take away a right (the right of exemption) acquired under a statute. Here again, Mr. Newcombe's answer appears to be conclusive. There is no difference between statute

law and common law, and consequently if effect is given to that point the government would be denied any power to amend the law as a war measure, no matter how urgent or necessary that might be for public safety. Such an interpretation seems absurd and impossible. It seems to me obvious that parliament intended, as the language used implied, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section contains unlimited powers. Parliament expressly enacted that, when need arises, the executive may for the common defence make such orders and regulations as they may deem necessary or advisable for the security, peace, order and welfare of Canada. The enlightened men who framed that section, and the members of Parliament who adopted it, were providing for a very great emergency, and they must be understood to have employed words in their natural sense, and to have intended what they have said."

Then, at pp. 167 and 168, Duff J., as he then was, says:

"The authority conferred by the words quoted is a law-making authority, that is to say an authority (within the scope and subject to the conditions prescribed) to supersede the existing law whether resting on statute or otherwise; and since the enactment is always speaking, 'Interpretation Act', s. 9, it is an authority to do so from time to time."

Recently Maclean J., the President of the Exchequer Court, had occasion to enunciate the rule of interpretation to be applied to s. 3 of The War Measures Act, 1914, and regulations made under the authority thereof, and I adopt what he says as part of my judgment. In *Spitz v. The Secretary of State of Canada*, [1939] Ex. C.R. 162 at p. 166, [1939] 2 D.L.R. 546, the learned judge said:

" . . . when you come to interpret Consolidated Orders, or any other war measure, the objects of the same must be held strictly in mind, and such measures must be given that construction which will best secure the end their authors had in mind. One must consider not only the wording of the war measures but also their purposes, the motives which led to their enactment, and the conditions prevailing at that time. In time of war particularly the substance of things must prevail over form, and usually all technicalities must be swept aside."

There is only one other point I should mention. In the statement of defence the defendant pleads s. 18 of The Judicature Act, R.S.O. 1937, c. 100. That section provides:

"The Court shall have power to relieve against all penalties and forfeitures, and in granting such relief to impose such terms as to costs, expenses, damages, compensation and all other matters as may be deemed just."

In my opinion, that section has application only where a forfeiture has taken place. Here the question is whether the Court shall declare a forfeiture. Moreover, it was held by the Judicial Committee of the Privy Council in *The King and the Provincial Treasurer of Alberta v. Canadian Northern Railway Company et al.*, [1923] A.C. 714, [1923] 3 W.W.R. 547, [1923] 3 D.L.R. 719, under a similar provision in force in the Province of Alberta, that the Court has no power to grant relief against statutory penalties. The forfeiture involved in the present instance is in the nature of a statutory penalty. The power of the Court to relieve against penalties and forfeitures is a power the Court possesses in the exercise of its jurisdiction in equity. Even if the power were one which extended to such a forfeiture as provided for by s. 40(2) of the Foreign Exchange Control Order and Regulations, I venture to think that the defendant's conduct in this instance has not been such as to place him in a favourable light before a court of equity. What equity is there in the case of a man who, on the evidence, was clearly endeavouring to avoid and defeat the laws of Canada, laws which have been ordained to conserve the resources of the country in a time of great peril? Equity insists that those who seek equity shall come with clean hands. Surely it cannot be said that this defendant, who seeks to invoke the assistance of a court of equity, comes with clean hands.

In the result, I am of opinion that ss. 22(1) and 40(2) of the Foreign Exchange Control Order and Regulations were validly made; and, for the reasons I have indicated, that these share warrants do fall within the scope of s. 40(2) and are the subject of forfeiture. I, accordingly, declare these shares to be forfeited to His Majesty the King, with costs.

Judgment accordingly.

*Solicitors for the plaintiff: Griffiths & Griffiths, Welland.
Solicitors for the defendant: German & Brooks, Welland.*

[COURT OF APPEAL.]

The City of Toronto v. Presswood Brothers.

Municipal Corporations — By-laws — Retrospective Operation — Restrictions on User of Property—User when By-law Enacted—The Municipal Acts, R.S.O. 1914, c. 192, s. 409(2); R.S.O. 1937, c. 266, ss. 406, 420, as amended by 1941, c. 35, ss. 13, 15.

It is of the very essence of the exercise of a power to regulate and control, and to prohibit, the use of buildings for certain purposes, that there will be interference with vested rights. The owner of land can thereafter no longer use an existing building, or erect a new building, for any of the designated purposes. In many cases this will affect the market value of his property, and it may defeat his intention in acquiring or holding it. This interference with vested rights, however, is inseparable from the exercise of such a power. *Toronto Corporation v. Trustees of the Roman Catholic Separate Schools of Toronto*, [1926] A.C. 81, referred to. It is therefore not a valid objection to a by-law passed in the exercise of such a power that it has this effect, and is to that extent retrospective. S. 409(2) of The Municipal Act, R.S.O. 1914, c. 192, authorized the councils of cities to pass by-laws for such purposes, and clause (b) of the paragraph expressly provided that it should not apply to buildings erected or used for such purposes on 26th April 1904, which was the date on which the paragraph first became law. The council of the plaintiff city adopted a by-law in 1915, containing an identical limitation.

Held, there was no justification for construing the statute and by-law as if the date set out were that of the passing of the by-law, rather than that actually contained therein. The defendants' building, which was erected in 1913, was therefore not exempt from the prohibition, even if, as found by the trial judge, it had been used as a factory continuously from the time of its erection. *City of Toronto v. Solway* (1919), 46 O.L.R. 24, discussed.

Statutes—Retrospective Operation—General Rules.

Statutes are not to be so interpreted as to have a retrospective operation unless they contain clear and express words to that effect, or the object, subject-matter or context shows such an intention. Even when a statute is in some degree retrospective, a larger retrospective operation should not be given than that which it can plainly be seen the legislature meant. Beal, *Cardinal Rules of Legal Interpretation*, 3rd ed., p. 468; *Lauri v. Renad*, [1892] 3 Ch. 402 at 420-1, referred to. This general rule operates to protect existing rights; they are not to be taken away or impaired unless the intention to do so is clear. Judgment of Plaxton J., [1943] O.R. 670, reversed.

AN appeal by the plaintiff from the judgment of Plaxton J., [1943] O.R. 670, dismissing the action. The facts are fully stated in the reasons for judgment now reported.

2nd December 1943. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and KELLOCK JJ.A.

J. R. Cartwright, K.C., for the plaintiff, appellant: We have five submissions: (1) The trial judge made no finding as to whether or not this building was used as a butcher shop; that it was so used is apparent from the evidence. (2) It does not appear from the evidence that it was used as a factory at

the date of passing the by-law (22nd February 1915). (3) The trial judge was wrong in holding that because it was used, when the by-law was passed, as a tin factory, it can now be used as a meat factory. (4) There must be continuity of usage to enable the owner to claim exemption from the by-law. (5) The critical date is not that on which the by-law was passed, but the date mentioned in the by-law itself, 26th April 1904; admittedly there was no building on the land at that date. S. 409(2)(b) of The Municipal Act, R.S.O. 1914, c. 192, was identical with s. 420(2)(b) of R.S.O. 1937, c. 266, and expressly sets out the date in 1904. The maxim *expressio unius est exclusio alterius* applies to the statute and by-law, and any building erected after 26th April 1904 is subject to the prohibition.

The evidence does not justify a finding that the building was used as a factory on the date of adoption of the by-law. The onus is upon the defendant to prove this, not upon us to disprove it: *Pleet v. Canadian Northern Quebec R.W. Co.* (1921), 50 O.L.R. 223, 64 D.L.R. 316, 26 C.R.C. 227.

Even if the by-law is to be held inapplicable to a building used for one of the prohibited purposes at the date of its passing, such a building continues to be exempt only so long as it is used for the same purpose. It is not sufficient to continue operating it as a factory. It must be a factory doing a similar kind of work, which is obviously not the situation in the present case. The statute uses precise words in the relevant section, to which full effect has not been given by the trial judge. The exemption granted by clause (b) does not read "so long as it is used for such purpose", but does read "so long as it is used as it was used on that day." If the intention was to exempt a building used at the relevant date as a factory, so long as it is used as a factory of any sort, the concluding words of the clause would have been "so long as it is used for such purpose." The use of the words "so long as" clearly contemplates a continuity of user, and while it may be that some temporary interruption of use would not be fatal to the exemption (which we do not concede), at all events, when the building is voluntarily devoted to a user of a sort not prohibited by the by-law (in this instance, a bottle exchange) the right to use the property again as a factory is lost. If the judgment at trial is right, a small factory which made furniture at the date of the by-law could expand until it finally became an abattoir. The critical date to be con-

sidered is 26th April 1904. It is a cardinal rule of construction of statutes that no words used by the legislature must be rejected, and some effect must be given to each word: *Rex v. Graves* (1910), 21 O.L.R. 329 at 355, 16 C.C.C. 318.

Everett Bristol, K.C., for the defendants, respondents. The proviso to clause 1 of the by-law should not be so construed as to give a retrospective operation to the by-law, and to make it applicable to a building erected or used as a factory prior to its date. The intention of the Legislature in this connection is shown by the amendment in 1917 to s. 409(2) of The Municipal Act, R.S.O. 1914, c. 192, by the addition of clause (2)(c), providing that the passing of a by-law under this section "shall not prevent the extension or enlargement of any building used for any of the purposes mentioned in this section at the time of the passing of the by-law": *City of Toronto v. Phillips* (1931), 40 O.W.N. 492 at 493-4. Under the decision of the Court of Appeal and the authorities cited by the trial judge in his judgment, municipalities have been told that they cannot legislate with regard to existing buildings. To adopt the language of the trial judge, there is nothing in the terms of the enactment expressive of a legislative intention that a city council should have power to pass by-laws having retrospective operation so as to render unlawful the use of a building already erected or used for any of the purposes mentioned in the enactment at the time a by-law is passed. If this building was a factory in 1913, it can now be used as a factory building, whether similar business is carried on there or not: *McCormick v. City of Toronto* (1923), 54 O.L.R. 603; *Re Secure Investments Ltd. and The Township of York*, [1933] O.W.N. 602.

By-law No. 14703, passed 15th March 1937, is valid and is an effective amendment of by-law No. 7304, and excludes from the operation of the latter, the building in question. Power of amendment or repeal of by-laws is inherent in the municipality and there is no limit, if the power is exercised in good faith. This Court cannot say without any evidence that this by-law was passed for the benefit of one person only: *Hurst v. Township of Mersea*, [1931] O.R. 290, [1931] 3 D.L.R. 355. It is not for the Court, but for the municipal council, to say what is in the public interest, and a by-law, while apparently for the benefit of an individual group, may be serving the public interest.

Re Waterous and City of Brantford (1903), 2 O.W.R. 897 is not applicable here because it was decided prior to the enactment, in 1913, of s. 249, which has now become s. 267(2) of 1937. Bad faith or clear excess of statutory authority must be proved before a by-law is held bad: *Re Rex v. Morello; Re Morello and the Town of Ingersoll*, [1936] O.W.N. 473 at 475.

The trial judge erred in holding that the building in question is within the limits of the district defined in the by-law. The language of the by-law defining these limits is ambiguous, and in case of ambiguity the Court should not find that the municipality contemplated an interference with vested rights unless the language used clearly requires such construction: *City of Toronto v. Wheeler* (1912), 3 O.W.N. 1424 at 1425, 22 O.W.R. 326, 4 D.L.R. 352.

J. R. Cartwright, K.C., in reply.

Cur. adv. vult.

30th December 1943. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the judgment of Plaxton J., dated 30th July 1943, after the trial of the action before him at Toronto. By his judgment the action was dismissed with costs.

The action was brought for an injunction restraining the respondents from operating a factory or butcher shop within a restricted area, contrary to the provisions of appellant's by-law no. 7304. The by-law in question was passed by appellant's council on 22nd February 1915, under a provision of The Municipal Act that was then s. 409, para. 2, c. 192 of R.S.O. 1914, and became, with some changes, in the Revised Statutes of 1937, s. 420, para. 2 of The Municipal Act, c. 266. The section provided for the passing of certain by-laws by the councils of cities, and as it stood when the by-law was passed, para. 2 was as follows:

“409. 2. For regulating and controlling the location, erection and use of buildings as livery, boarding or sales stables, and stables in which horses are kept for hire or kept for use with vehicles in conveying passengers, or for express purposes, and stables for horses for delivery purposes, laundries, butcher shops, stores, factories, blacksmith shops, forges, dog kennels, hospitals

or infirmaries for horses, dogs or other animals and for prohibiting the erection or use of buildings for all or any or either of such purposes within any defined area or areas or on land abutting on any defined highway or part of a highway:

"(a) The by-law shall not be passed except by a vote of two-thirds of all the members of the council;

"(b) This paragraph shall not apply to a building which was on the 26th day of April, 1904, erected or used for any of such purposes, so long as it is used as it was used on that day."

The by-law provided that "No building shall be located, erected or used as, a laundry, a butcher shop, a store, a factory, a blacksmith shop, a forge, a dog kennel or hospital, or infirmary for horses, dogs or other animals" within a defined area. The by-law also contained a proviso substantially in the terms of clause (b) of the paragraph of the statute above quoted.

The building occupied and used by the respondents is within the area defined by the by-law, as the trial judge has interpreted and applied the description contained in the by-law. In this building the respondents have carried on, since 1937, the business of pork packers. They buy from five to six thousand pounds of meat per day, the larger part of which is manufactured on the premises into sausages, wieners and cooked meats. From 800 to 1,000 pounds of meat are sold daily in a raw state to the retail butcher trade direct, on the premises. The building in which this business is carried on was erected in 1913 by a man whose business was that of a roofing and sheet-metal contractor. He used part of the premises for storing his raw materials, part of it as a work-shop, and the basement he used as a stable. This man went out of business in 1915, after the passing of the by-law, and the next occupant was the "Diamond Cleaners", the exact nature of whose business is not stated. A candy manufacturer was the next occupant, and in this period there was a fire, which damaged the premises, and for a time they were vacant. The next occupant used the building for manufacturing perfumes and extracts. In 1930 the occupant was the Toronto Milk Bottle Exchange, whose main business, apparently, was that of collecting milk bottles, sorting them, and returning them to the dairies to which they respectively belonged. This was the last occupant prior to the respondents.

The learned trial judge held that the building in question was used as a factory at the time the by-law was passed in

February 1915, the occupant at that time using it for the purposes of his business as a roofing and sheet metal contractor, and that except for some periods of disuse it has been used as a factory, within the meaning of the statute, from the time of its erection. He held that, on the proper construction of the statute and the by-law, the decisive question is: Has the building ever ceased to be used as a "factory" notwithstanding that it was used for the manufacture of different kinds of commodities from time to time? His decision was that it was none the less a "factory," and exempt from the prohibition contained in the by-law.

There was much argument as to the proper interpretation of the by-law and the statute in this respect, as well as to whether all the several businesses that had been carried on in the building were such that it could be said that it had always been used as a factory. I do not think it is necessary to go into these matters because of the opinion I have formed as to the scope of the by-law itself, although I am compelled to say that I find great difficulty in regarding the use made of the building by the Milk Bottle Exchange, which was the occupant for several years, as in any sense that of a factory.

It will be noted that both by the statute, in clause (b) of para. 2, and by the by-law, a building which was, on the 26th day of April 1904, erected or used for any of the purposes mentioned, is expressly exempted from the regulation, control and prohibition of the by-law, so long as it is used as it was used on the 26th day of April 1904. It is obvious that this building does not come within the description of buildings exempt under that express provision, for the building was not erected until 1913. The learned trial judge, however, adopted the contention of counsel for the respondents that the provisions of the by-law should be held not to apply to any building erected or used at the time of the passing of the by-law for any of the designated purposes, so long as it continued to be used as it was used on the day the by-law was passed. He regarded clause (b) of para. 2 of the statute, and the proviso in the by-law, as unnecessary and ineffective. In his view, all that the statute authorized, and all that the by-law accomplished, was to prohibit the use for the designated purposes of buildings not erected or not in use for any of these purposes at the time of the passing of the by-law.

To give any other effect to the by-law would, in his opinion, give it a retrospective operation.

I have not found it so simple as it seemed to the learned trial judge to arrive at the proper interpretation of the statute, or to determine the real effect of the by-law. Of certain of the learned trial judge's propositions there can be no dispute. Statutes are not to be interpreted so as to have a retrospective operation unless they contain clear and express words to that effect, or the object, subject-matter or context shows a contrary intention. Even where a statute is, in some degree, retrospective, a larger retrospective operation should not be given than that which it can plainly be seen the legislature meant: Beal, Cardinal Rules of Legal Interpretation, 3rd ed., p. 468; *Lauri v. Renad*, [1892] 3 Ch. 402, per Lord Lindley L.J. at 420, 421. This general rule against giving a retrospective effect to a statute, except where it is plain that it was intended, operates to protect existing rights. They are not to be taken away, nor impaired, unless the intention to do so is clear.

These are the general rules that the learned trial judge has applied in this case. It is necessary to examine the statute and the by-law. The statute is an enabling one. It does not purport to do more than to authorize the councils of cities to enact certain by-laws. It delegates to them a measure of the power to make laws in relation to municipal institutions in the Province vested in the Legislature by s. 92(8) of The British North America Act. The Legislature can delegate its own powers in municipal matters to a municipal body as fully as it could exercise them itself. As was said by the late Chancellor Boyd, "Having created the municipality, the Province is able to confer upon that body any or every power which the Province itself possesses under the Confederation Act." *Smith v. City of London* (1909), 20 O.L.R. 133 at 154. See also as to the right of the Legislature to delegate its powers, *Township of Sandwich East v. Union Natural Gas Co.*, 56 O.L.R. 399, [1925] 2 D.L.R. 707, affirmed 57 O.L.R. 656, [1925] 4 D.L.R. 795.

Applying these principles to the statute here in question, that is, to para. 2 of s. 409 of R.S.O. 1914, c. 192, the Legislature, having conferred on the councils of cities, in broad general terms, power to pass by-laws for regulating and controlling the location, erection and use of buildings for certain purposes, and for prohibiting the erection or use of buildings for all or any of such

purposes within any defined area or areas, or on land abutting on any defined highway, or part of a highway, has, in clause (b) of para. 2, said that the paragraph shall not apply to buildings erected or used on the 26th day of April 1904 for any of the designated purposes. Is it permissible to say that besides the express exception that the Legislature has made from the power it has delegated, there is another and wider exception that will include the same buildings, and perhaps many more? The learned trial judge has held that there is excepted from the delegated power all buildings erected or used for any of the designated purposes at the time of the passing of the by-law.

I do not know any principle of construction, applicable to a statute by which the Legislature merely delegates power to make by-laws, that justifies the implication of such an exception. The statute itself has no retrospective operation. The by-laws made under it will, of necessity, be by-laws passed by the councils of cities after the statute has come into operation. This, of course, does not, by any means, settle all that is involved in this case, for the by-law itself is to be construed as well, and the well-established rules against retrospectivity may be applicable to a by-law as fully as to a statute. It is important, however, in approaching the question, to ascertain accurately and by the proper application of principles of interpretation, the scope of the authority delegated by the Legislature.

It is of the very essence of the exercise of the power to regulate and control the location, erection and use of buildings for designated purposes, and to prohibit the erection or use of buildings for all or any of these purposes within defined areas, that there will be interference with vested rights. An owner who, before the passing of such a by-law as is contemplated by the statute, had a right to erect a factory on his land, or to use as a factory a building already erected on his land but theretofore used for other purposes, can no longer exercise this right after the passing of the by-law. In many cases the market value of his property will be affected, and it may be that his intentions in acquiring or in holding the land will be defeated. This interference with vested rights is inseparable from the exercise of these powers of regulation, control and prohibition: *Toronto Corporation v. Trustees of the Roman Catholic Separate Schools of Toronto*, [1926] A.C. 81, [1925] 3 D.L.R. 880.

This statute, therefore, which in itself provides only for conferring on councils the power for the future passing of by-laws, plainly contemplates the passing of by-laws that will operate retrospectively, in the sense that they may interfere with and impair existing rights. In some degree that will be inevitable. That being so, why should the clause in the statute itself, by which the Legislature has placed a restriction upon the extent to which vested interests may be interfered with by by-law, be disregarded or put aside and another implied in its place? Clause (b) of para. 2 of s. 409 surely contains the restriction that the Legislature intended to place upon the powers delegated to the councils of cities. It may well be that in a particular case the council, in its discretion, will decide not to exercise its delegated powers to the full. It may consider it more reasonable and fair, having regard to all the interests concerned, to make the passing of the by-law, rather than the 26th day of April 1904, the time to divide the buildings, the erection or use of which shall be prohibited, from those that shall not be affected by the by-law. The judgment of this Court in *City of Toronto v. Solway* (1919), 46 O.L.R. 24, delivered by that eminent municipal lawyer, the late Sir William Meredith, is instructive on this aspect of the question. In that case the by-law did in fact provide that it should not apply to any buildings "now" (that is, at the date of the passing of the by-law) erected or used for any of the purposes mentioned, so long as they continued to be used as "at present". It was objected that the by-law was invalid because it discriminated in favour of persons who, after 26th April 1904, and before the passing of the by-law, had erected buildings for the purposes mentioned in the by-law, and which were still being used for these purposes when the by-law was passed. This contention was rejected. The learned trial judge in the present case quotes, as supporting his opinion, the remarks of the learned Chief Justice upon it. I shall not quote them again, but I call attention to the terms used by the learned Chief Justice. He says: "It would, I think, have been an unreasonable exercise of the powers of the council if the by-law had made unlawful the use, for the purposes of stabling horses for delivery purposes, of buildings which had been erected and were then being used for that purpose." Clearly, the learned Chief Justice did not think a question of the power of the council was the question involved,

but considered that the powers of the council extended beyond the limits of the by-law it had passed. Their reasonable exercise in that case was another matter. No one would have been more aware than was the late Chief Justice, that since 1913 the validity of a by-law cannot be attacked on the ground of unreasonableness—see now s. 267(2), R.S.O. 1937, c. 266: *Re Howard and City of Toronto; Re Sweet and City of Toronto*, 61 O.L.R. 563 at p. 574, [1928] 1 D.L.R. 952. Nowhere does he suggest a doubt of the validity of a by-law such as that in question here, and, indeed, no such question was before the Court in the *Solway* case.

There is another ground for thinking that the learned trial judge failed to attach proper significance to clause (b) of para. 2 of s. 409. The clause was in somewhat different terms, but to the same effect, when para. 2 was first enacted. Clause (b) was enacted in its present form in The Municipal Act, 1913, 3-4 Geo. V, c. 43, s. 409. It will be observed, on looking at s. 420 of The Municipal Act, as it is in the Revised Statutes of 1937, that several paragraphs were added to it from time to time, and that a number of them contain a clause in terms similar to clause (b) of para. 2, but with dates that vary according to the date of enactment. See para. 3(a), with the date 1st May 1914; para. 4(a), with the date 1st May 1916; para. 6(a), with the date 1st April 1918; para. 7(a), with the date 1st May 1919; para. 9(a), with the date 1st April 1928. This array of dates should suffice to dispose of the suggestion made in *City of Toronto v. Phillips* (1931), 40 O.W.N. 492, also cited by the learned trial judge, that the amendment made in 1917 to the former s. 409 indicated that it was not the intention of the Legislature to authorize municipal councils to interfere with factories already established, and presupposed the right of continued existence to subsist in respect of any building used for any of the purposes mentioned in s. 409 at the time of the passing of the by-law. The enactment of 1917, which dealt only with extensions and enlargements, may have been none too carefully drafted, but it does not purport to alter anything in the statute already passed. The long series of later clauses modelled on clause (b) is strong indication of a continued legislative intention.

The still later legislation of 1941 (5 Geo. VI, c. 35) which, by s. 15, repeals paras. 2 to 10 of s. 420, and by s. 13 enacts entirely new provisions, expressly provides that every by-law

passed for any of the purposes of any provision repealed by this Act, shall remain in full force and effect until amended or repealed.

In my opinion, therefore, the city council had, under the statute in question, power to enact, with the same force and effect as if it were a law enacted by the Legislature, a by-law in the terms of s. 409 of The Municipal Act as it stood when the by-law was passed, and to include as part of that by-law the limitation of its application taken from clause 2(b) of s. 409 of the statute. That by-law is still preserved by the legislation of 1941. As to the proper interpretation of that by-law, having been drawn in the terms of the statute authorizing it, it should, in my opinion, have the same interpretation. No other intention can reasonably be attributed to the council. Further, I am of the opinion that simply as a matter of construction the proviso in the by-law sufficiently indicates the intention that all buildings not within the exception it defines shall be subject to the prohibition of the by-law. To substitute for the date mentioned in the proviso such words as "on the date of the passing of this by-law" is not warranted as interpretation, but would be to legislate. The question of the reasonableness of the by-law was a matter solely for the council that passed it, and it may be safely assumed that two-thirds of the members of the council of the time formed a tribunal much better fitted to pass upon the need for the by-law in 1915, and its propriety and fairness, than a court can be at this date.

In my opinion, appellant's by-law No. 7304 is effective to prohibit the use of the premises in question for the purposes for which respondents use them, notwithstanding any uses to which they have been put since their erection in 1913.

Respondents relied upon a later by-law, no. 14703, passed by the council of the appellant on 15th March 1937. This by-law is as follows:

"No. 14703. A by-law

"To repeal By-law No. 7304 in so far as it prevents the manufacture of pressed meats and sausage at No. 296 Gladstone Avenue.

(Passed March 15th, 1937.)

"The Council of the Corporation of the City of Toronto enacts as follows:

I.

"The provisions of By-law No. 7304, being 'A By-law to prohibit the erection or use for laundries and for other purposes of any building within the district bounded by the rear limit of the lots fronting on the west side of Gladstone Avenue, the north limit of Dundas Street, the south limit of College Street and the rear limit of the lots fronting on the east side of Dovercourt Road, excepting the Dundas Street and College Street frontages' shall not apply to prevent the use of the small three-storey brick building located at the rear of premises known in the year 1937 as No. 296 Gladstone Avenue for the manufacture of pressed meats and sausage; and the said by-law No. 7304 is hereby repealed in so far as it prevents such use of the said building."

"W. D. ROBBINS"

"Mayor

"J. W. SOMERS"

City Clerk.

"Council Chambers, Toronto, March 15th, 1937. (L.S.)"

The learned trial judge was of opinion that this by-law is invalid on its face. I am in agreement with that opinion. The terms in which by-law no. 14703 is expressed are not apt to effect a repeal of any provision contained in by-law no. 7304. The area designated by the earlier by-law is not altered, nor are the purposes for which the use of buildings is prohibited, as stated in the by-law, differently defined. The building in question is still to remain generally under prohibition as to use as a "factory." All that the by-law in terms purports to do is to permit the manufacture of pressed meats and sausage on these premises. I do not think any power is given the council to do this by declaring the application of a by-law long in force. It is to be noted also that the later by-law does not say anything to permit the substantial trade daily carried on in this building, in selling uncooked meat to the retail trade.

On the argument of the appeal I understood appellant's counsel to argue that by-law no. 14703 was invalid on the ground that it was not passed in good faith, and I entertained doubt as to his status to raise that issue, the more especially as it had not been pleaded. The true ground of its invalidity is, however, that which I have stated. It is simply an ineffectual attempt to grant an individual and partial exemption, while retaining the restricted area intact.

The appeal should be allowed, and there should be an injunction as claimed, instead of judgment dismissing the action. Appellant is entitled to costs of both the action and the appeal.

Appeal allowed and judgment directed for the plaintiff, with costs of action and appeal.

Solicitor for the plaintiff, appellant: W. G. Angus, Toronto.

Solicitors for the defendants, respondents: White, Ruel & Bristol, Toronto.

[LAIDLAW J.A.]

Kruger v. Mutual Benefit Health and Accident Association.

Insurance—Construction of Policy—Limitations on Rule of Construction against Insurer.

The rule laid down in *Anderson v. Fitzgerald* (1853), 4 H.L. Cas. 484 at 507, 513, that a policy of insurance should be construed against the insurer and in favour of the insured, is limited to cases of doubt or ambiguity. If the words of the policy are plain and unambiguous in their ordinary meaning they will be construed according to that meaning, and the ambiguity, to make the rule applicable, must be a real, not a fanciful, one. *Graham v. London Guarantee and Accident Co.* (1925), 56 O.L.R. 494; *Cornish v. The Accident Insurance Company, Limited* (1889), 23 Q.B.D. 453, referred to.

Insurance—Accident Insurance—Meaning of Terms—“Continuously confined within doors”—Visited “therein” by Physician.

In an action upon a policy of insurance providing for indemnity for disease as a result of which the insured was confined “continuously within doors” and regularly visited “therein” by a physician, held, on the evidence, the plaintiff, having left the house from time to time, as and when he desired to do so, during the period for which indemnity was claimed, and having visited his physician at the latter’s office, was not entitled to recover under this clause. He was, however, entitled to recover under another clause of the policy, providing for indemnity for “non-confining illness”.

Held, further, although the plaintiff, after a previous attack of the same disease, had endorsed a cheque bearing the words “in full payment, satisfaction, discharge, compromise and release of any and all claims of liability . . . for any past, present or future loss or disability resulting from injury or illness sustained prior to this date”, this should not be taken as a waiver or release of claims for disability arising after the claim for which that payment was made. *Kent v. Ocean Accident and Guarantee Corporation* (1909), 20 O.L.R. 226; *Lee v. Lancashire and Yorkshire Railway Company* (1871), L.R. 6 Ch. 527, referred to.

Insurance—Notice and Proofs of Loss—Relief against Forfeiture for Failure to Furnish—The Insurance Act, R.S.O. 1937, c. 256, s. 217.

Where, although an insured had not furnished formal proofs of claim as required by a statutory condition of the policy, the insurer had been advised of the illness both by the insured’s daughter and by his physician, held, in view of all the circumstances, it would be inequitable that the insurance should be forfeited or avoided because of the

insured's imperfect compliance with this condition, and the Court, under s. 217 of The Insurance Act, should relieve against such forfeiture or avoidance on this ground.

AN action upon a policy of insurance. The facts are fully stated in the reasons for judgment.

8th September 1943 and 10th, 11th and 28th January 1944. The action was tried by LAIDLAW J.A. without a jury at Toronto.

F. J. Hughes, K.C., for the plaintiff.

W. J. Beaton, K.C., and *E. M. Hand*, for the defendant.

31st January 1944. LAIDLAW J.A.:—This action is brought on a policy of insurance issued by the defendant, dated the 31st day of January 1938, and numbered 60 SD-61502. The plaintiff claims indemnity for disability resulting from a disease suffered by him, and additional hospital benefits, and asks for a declaration of certain rights under the policy.

On or about 15th March 1941 the plaintiff had an attack of illness which was diagnosed by his physician, Dr. Parker, as coronary sclerosis, angina pectoris and "possibly coronary thrombosis". He was disabled by reason thereof and made a claim in writing dated "21 day of April, 1931" (which admittedly was intended to read "21 day of April, 1941") for sick benefits.

The defendant sent to the plaintiff a cheque in his favour dated 30th April 1941, for \$55.00. The following words were printed on the back of the cheque:

"In full payment, satisfaction, discharge, compromise and release of any and all claims of liability, which payee, his heirs or beneficiary now claim or might hereafter claim under policy No. 60SD-61502 for or on account of injury or illness sustained by Sam Kruger on or about March 16, 1941, and for any past, present or future loss or disability resulting from injury or illness sustained prior to this date."

The plaintiff and his wife, Mary Kruger, signed their names immediately below the words above quoted, and the plaintiff received the proceeds of the cheque.

After the claim was made by the plaintiff (on or about 21st April 1941), he returned to work for two days, and on the third day, while he was at work, he had a second attack of illness which his doctor says was "definitely coronary thrombosis". This diagnosis was later confirmed by Dr. Hamilton. The plaintiff was not afterwards able to carry on his business of operating a concession stand for the sale of soft drinks. He disposed of his

business and has not done work of any kind since the second attack of illness.

The defendant was informed, orally, of the plaintiff's illness, and addressed a letter to him, dated 26th May 1941, in which, in part, it is stated:

" . . . you will find enclosed an affidavit to be completed by yourself and attending physician so that our Claims Committee may have a report to review your file again."

Subsequently, on 16th June 1941, the defendant wrote a letter to the plaintiff, saying:

"We are now in receipt of a statement from your attending Physician to the effect that the condition which has recently disabled you is a recurrence or, in other words, an exacerbation of the disability for which you were paid indemnity of \$55.00 by the Association on April 30th, and the settlement was tendered for final payment of indemnity for disability commencing on, or about, March 15th, 1941. Therefore, under the circumstances, we regret to advise that our Claims Committee cannot favorably consider payment of benefits for your present disability."

The plaintiff did not give notice and proof of claim in accordance with the statutory conditions annexed to the policy of insurance, and there was no waiver of them "clearly expressed in writing signed by the insurer" as therein provided.

The plaintiff now claims:

"(a) The amount of confining illness benefits under Part J of the said policy from the 21st day of April 1941.

"(b) The sum of \$22.00 hospital benefit under Part M. of the said policy from the 16th day of May to the 9th day of June 1941, at \$30.00 per month.

"(c) A declaration that he is totally disabled by reason of disease of the heart, the cause of which originated more than 30-days after the effective date of the said policy and which confines the plaintiff continuously within doors and requires regular visits therein by a legally qualified physician, and that he is therefore entitled to receive \$60.00 per month for such disability."

The policy of insurance insures the plaintiff against "loss of time beginning while this Policy is in force and resulting from disease contracted during any term of this

Policy . . . subject, however, to all the provisions and limitations hereinafter contained."

I quote from the "General Provisions" as set forth in heavy type in the policy, as follows:

"(a) This policy does not cover death, disability, or other loss . . . while the Insured is not continuously under the professional care and regular attendance, at least once a week, beginning with the first treatment, of a licensed physician or surgeon, other than himself; . . .

"(b) Strict compliance on the part of the Insured and beneficiary with all the provisions and agreements of this policy . . . is a condition precedent to recovery and any failure in this respect shall forfeit to the Association all right to any indemnity, and the Insured shall as a condition precedent to recovery hereunder furnish the Association every thirty days with a report in writing from his physician stating the condition of the Insured and the nature, cause and probable duration of the disability."

The "Illness Indemnities" covered by the policy are of two classes, as set forth in Part J and Part K respectively, which I reproduce:

"PART J. CONFINING ILLNESS BENEFITS FOR LIFE

"The Association will pay, for one day or more, at the rate Thirty (\$30.00) Dollars per month for the first fifteen days and at the rate of Sixty (\$60.00) Dollars per month thereafter for disability resulting from disease, the cause of which originates more than thirty days after the effective date of this policy, and which confines the Insured continuously within doors and requires regular visits therein by legally qualified physician; provided said disease necessitates total disability and total loss of time.

"PART K. NON-CONFINING ILLNESS THIRTY DOLLARS PER MONTH.

"The Association will pay, for one day or more, at the rate of Thirty (\$30.00) Dollars per month, but not exceeding three months, for disability resulting from disease, the cause of which originates more than thirty days after the effective date of this policy, and which does not confine the Insured continuously within doors but requires regular medical attention; provided said disease necessitates total disability and total loss of time."

"Additional Benefits If Confined to Hospital" are set forth in Part M, as follows:

"PART M. ADDITIONAL BENEFITS IF CONFINED TO HOSPITAL.

"If the Insured, on account of any disability covered by this policy, shall be confined within a hospital, the Association will pay for such hospital confinement an additional indemnity at the rate of Thirty (\$30.00) Dollars per month, not exceeding three consecutive months."

I first consider Part J of the policy, apart from the General Provisions. It is urged by counsel for the plaintiff that this Part, and also all other Parts, provisions and conditions in the policy ought to be interpreted strictly as against the defendant, and liberally towards the plaintiff. The principle relied upon is stated by Lord St. Leonards in *Anderson v. Fitzgerald* (1853), 4 H.L. Cas. 484, 10 E.R. 551. Referring to the construction to be put upon a policy of insurance, he says, at p. 507:

"It is of course prepared by the company, and if therefore there should be any ambiguity in it, must be taken, according to law, more strongly against the person who prepared it." At p. 513, he continues: "I think . . . every Court of Justice, should endeavour to give such a construction to a policy of this nature as will afford a fair security to the person with whom the policy is made, that, upon the ordinary construction of language, he is safe in the policy which he has accepted." See also *Graham v. London Guarantee and Accident Co.*, 56 O.L.R. 494 at 505, [1925] 2 D.L.R. 1037.

The contract of insurance should be given a reasonable interpretation. The Court should endeavour to see that the insured obtains all the benefits fairly and reasonably in contemplation of the parties at the time the policy was issued. In a case of doubt or uncertainty, the Court should not readily be persuaded to negative or minimize the obligation of the insurer. But the application of the principle mentioned requires that there should be an obscurity, uncertainty or ambiguity in the policy. The doubt or difficulty in construction must not be fanciful, it must be real.

Lindley L.J. in *Cornish v. The Accident Insurance Company, Limited* (1889), 23 Q.B.D. 453 at 456 says:

"In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty."

In the policy presently under consideration the words in Part J can be read without leaving any reasonable doubt as to the intention of the parties. In their plain ordinary meaning they do not leave any uncertainty in my mind. Likewise, Rose C.J.H.C. did not find any ambiguity in them in considering the case of *Gyles v. Mutual Benefit Health and Accident Association* (1940), 7 I.L.R. 195. He says at p. 196:

" . . . the cardinal rule of construction is that plain words shall be given their plain meaning, and the words of the policy are in my opinion perfectly plain."

Part J of the policy is intended to contain a description of the degree of the illness for which the insurer is bound to make payments at the rates stated therein. In order to recover the benefits set forth in this Part the plaintiff must show by evidence that all the requisites therein are satisfied. He must establish that he suffered from a disease which necessitated total disability and total loss of time. He must also show (a) disability for one day or more resulting from the disease; (b) that the cause of the disease originated more than thirty days after the effective date of the policy; (c) that the disease confined him continuously within doors, and (d) that it required regular visits therein by a legally qualified physician.

I find that the disease from which the plaintiff suffered after 21st April 1941 necessitated total disability and total loss of time from the date the plaintiff had a second attack of illness, as mentioned, up to the time of trial. The cause of the disease originated more than thirty days after the effective date of the policy as specified. The important question to be determined is whether the plaintiff suffered from a disease which confined him "continuously within doors" and required visits "therein" by a legally qualified physician. It is unnecessary to decide what the result would be if these words were to be applied in a literal sense to every case in which the insured has total disability and a total loss of time. It may be that the continuity of confinement within doors might be interrupted, or that regular visits "there-

in" by a legally qualified physician might not be made under special circumstances, but that this nevertheless would not disentitle the insured to the benefits provided by this part of the policy. It has been held, for instance, that the recovery on a policy insuring against illness, which limits liability to the period when the assured is continuously confined to his house and subject to the personal calls of a registered physician in good standing, is not defeated by the fact that the insured went out by direction of his physician for an occasional and necessary airing, if, by reason of the illness, he was continuously confined to the house the larger portion of the time: *Hoffman v. Michigan Home and Hospital Association* (1901), 128 Mich. 320, 87 N.W. 265; *Great Eastern Casualty Company v. Robins* (1914), 111 Ark. 607, 164 S.W. 750; *Metropolitan Plate Glass & Casualty Insurance Company v. Hawes, Ex'x.* (1912), 150 Ky. 52, 149 S.W. 1110; *Home Protective Association v. Williams* (1912), 151 Ky. 146, 151 S.W. 361.

Counsel for the plaintiff relies on the case of *Guay v. Provident Accident & Guarantee Company* (1916), 51 Que. S.C. 328, 34 D.L.R. 72. This case is clearly distinguishable from the one presently under consideration. The words in the policy under interpretation in that case were "If any illness . . . necessarily confines the assured to the house." In the policy presently under examination the Association will pay for disability resulting from disease which confines the insured "continuously within doors" and requires regular visits "therein". In the *Guay* case indemnity was payable by reason of confining illness. There was no provision for payment of indemnity for loss of time by reason of non-confining illness as in the present policy. The circumstances of the two cases are different.

The words "necessarily and continuously confined within the house" and "therein" regularly visited by a physician were considered and interpreted in *Kempfert v. Continental Casualty Company*, [1933] 1 W.W.R. 70, [1933] 1 D.L.R. 800. It was held that under the circumstances shown in evidence in that case the plaintiff had no right to recover under the clause.

What might appear to be contradiction and confusion in the decisions is explainable by the difference in the words used in the policy and the particular circumstances of each case. It is essential to examine in some detail the facts and circumstances disclosed by the evidence, and to decide whether it can be reason-

ably concluded therefrom that the disease contracted by the insured is of such a grade and extent as fairly to bring it within the description set out in the policy.

It is not disputed that about 1st May 1941 the plaintiff went to the office of Dr. Hamilton in the Medical Arts Building, Toronto, for examination by him. About 16th May he went to the Western Hospital by taxicab and remained there until 9th June, when he returned to his home at 36 Henry Street. About the end of June he went to a cottage at Belle Ewart, a summer resort about 50 miles from Toronto. He and his wife remained there with friends until the end of August. During that period he says he "just stayed in bed" and he was visited from time to time by Dr. Parker. He again returned to his home. Since then he goes to the office of Dr. Hepburn every three months. Dr. Hepburn has never been to the plaintiff's home. In July and August 1942 the plaintiff and his wife were again at Belle Ewart. Dr. Parker visited him "once or twice" and on one occasion the plaintiff called a doctor from a nearby village of Churchill. The plaintiff came back to his home about the end of August 1942. He visited Dr. Hamilton at his office up to December 1942. In the depositions of the plaintiff, taken at his home on 7th April 1943, pursuant to an order of the Assistant Master, he stated he had not been out of his house at all since December (when he went to see Dr. Hamilton). I do not accept this evidence of the plaintiff. On the contrary, I find he was out of his house frequently and at various places. I accept the evidence of Mrs. Alma Noonan, Lucy Denroch, George A. McCullough, and Arthur E. Rieby, witnesses for the defence. According to their testimony the plaintiff was frequently out of the house. From time to time he was seen alone on Henry Street, McCall Street, Cecil Street, and Spadina Avenue. McCullough, a detective employed by the defendant, saw the plaintiff, on 24th January 1943, leave his residence, walk south on Henry Street to Cecil Street, and west for two blocks on Cecil Street where he entered a building in which a club-room is located. The plaintiff stayed in the building for more than an hour before walking home again. On 7th February 1943 the plaintiff went on foot to and from the same place. On 25th March 1943 he walked to the same building on Cecil Street, from there to a store on Spadina Avenue, where he made a purchase, and walked home. Stella Kruger, daughter of the plaintiff, admits that "he has gone to the club-

room" (in Cecil Street)—"he has gone out to get papers—for a change of air," that he has been out in a motor car for twenty minutes or half an hour. Another daughter, Elsie Lahman, says "My husband and I used to take him for a drive." It is my conclusion from the evidence that the plaintiff went out of his house from time to time, as and when he chose to do so, during the period for which the claim is made for benefits under Part J of the policy. Moreover, it is stipulated that the disease must be such as requires regular visits "therein" by a legally qualified physician. The word "therein" means "within doors" and refers to the place of confinement. The plaintiff was able to visit Dr. Hamilton and also Dr. Hepburn (every three months) at their offices in the Medical Arts Building. The plaintiff does not seek to recover indemnity from day to day for such days as he was totally confined to the house, nor for any particular portion or portions of the period following his illness. There is no evidence of the days when the plaintiff was wholly within the house and of the days when he went out on the street.

I find that the disease suffered by the plaintiff did not confine him "continuously within doors" and did not require regular visits "therein" by legally qualified physicians. It follows that the plaintiff is not entitled to the benefits provided in the policy under Part J.

In my opinion the plaintiff had a "non-confining illness" within Part K of the policy. I find that he had a disability resulting from disease "which does not confine the Insured continuously within doors but requires regular medical attention" as therein specified. Under this Part the defendant agreed to pay "for one day or more, at the rate of Thirty (\$30.00) Dollars per month, but not exceeding three months. . ." The liability of the defendant is, therefore, limited in this Part to the amount of \$90.00.

If the plaintiff be entitled to recover indemnity from the defendant for disability resulting from disease, he is also entitled to additional benefits under Part M of the policy by reason of his confinement in the hospital. The amount claimed by the plaintiff for such hospital confinement is \$22.00. Thus, if the defendant be liable to the plaintiff under the policy, I hold that the amount of such liability is limited to \$90.00 under Part K, and \$22.00 under Part M, making a total of \$112.00.

Counsel for the defendant argues that the action ought to be dismissed because (1) notice and proof of claim were not furnished in accordance with requirements of the statutory conditions; (2) the plaintiff gave to the defendant a release from liability; (3) the condition set forth in paragraph (a) of the General Provisions has not been satisfied.

The defendant was informed by the plaintiff's daughter of the fact of his illness, and subsequently received a statement from the attending physician. It would be inequitable that the insurance should be forfeited or avoided on the ground that there has been imperfect compliance with a statutory condition as to proof of loss to be given by the insured. Therefore, in exercise of the powers contained in s. 217 of The Insurance Act, R.S.O. 1937, c. 256, I would grant relief against such forfeiture or avoidance on this ground.

It is urged that a release was executed by the plaintiff when he endorsed the cheque below the printed words thereon. I do not agree. It does not appear from the evidence that the plaintiff read the words, or that he understood the meaning of them. There is no evidence to show that the plaintiff intended to release the defendant from liability which might arise from a claim under the policy after the time the cheque was endorsed. In the absence of such intention, and having regard to the testimony that the plaintiff could not read the words printed in English, I find there was no such intention on his part. See *Kent v. Ocean Accident and Guarantee Corporation* (1909), 20 O.L.R. 226 at 232. In any event it is my opinion, and I hold, that the words ought not to be interpreted as a release from such liability. There was no consideration from the defendant to the plaintiff for a promise by him to forego rights in law which might accrue to him in the future. There is no seal on the instrument. The words do not evidence a valid agreement or release, as urged by the defendant, but merely show a receipt in full payment of a claim for prior loss of time resulting from illness suffered before the time of payment. The words purporting to release the defendant from liability for claims which the plaintiff might make in the future do not in law obtain that force and effect: *Lee v. Lancashire and Yorkshire Railway Company* (1871), L.R. 6 Ch. 527.

I examine General Provision (a) as contained in the policy. The contractual obligation of the defendant as set forth in the

insuring clause is made expressly subject to all provisions and limitations in the policy. It is argued that the evidence does not show that the insured was "continuously under the professional care and regular attendance, at least once a week, beginning with the first treatment, of a licensed physician or surgeon". Again, I am not required to interpret provision (a) generally, but must give to it a reasonable construction under the particular circumstances of this case. Perhaps cases might arise in which a literal compliance with the requirements of the provision would be essential to entitle a claimant to indemnity under the policy, and likewise particular circumstances might be shown in other cases in which a literal interpretation of the provision would unfairly, unreasonably and unjustly defeat the real intention of the contracting parties. See *Barbeau v. Merchant's Casualty Coy.* (1927), 44 Que. K.B. 295. Upon the evidence I find that during the period of three months following 21st April 1941 the plaintiff was "continuously under the professional care and regular attendance, at least once a week, beginning with the first treatment, of a licensed physician or surgeon" but that that condition was not satisfied in the subsequent period of time included in the claim. During the months of July and August 1942, Dr. Parker saw the plaintiff "once or twice" and the plaintiff called a physician from Churchill on one occasion. He also visited Dr. Hamilton from time to time, and Dr. Hepburn at intervals of three months. But there was not, throughout the period of claim, a "regular attendance, at least once a week" as reasonably contemplated by the provision. It is also to be noted that at the time of trial his condition of health had apparently improved to such an extent that in the opinion of his physician he might "sit at a desk for a couple of hours." It does not appear for what length of time he was well enough to do that.

It is unnecessary to consider the force and effect of that part of para. (b) of the General Provisions reading as follows: "the Insured shall as a condition precedent to recovery hereunder furnish the Association every thirty days with a report in writing from his physician stating the condition of the Insured and the nature, cause and probable duration of the disability." This requirement was not fulfilled, but counsel for the defendant took the position that by reason of the contents of letters dated 26th May 1941 and 16th June 1941 from the defendant to the

plaintiff, as quoted herein, a defence to the action is not now available under that clause of the policy. It is stated that full consideration was given to the rights of the defendant thereunder, and on advice of counsel the defendant deliberately refrained from raising a defence on the ground that the condition therein set forth had not been complied with by the plaintiff.

During argument counsel for the plaintiff asked the Court to declare that the policy of insurance in question is presently in force and effect. This question was not in issue on the pleadings and no prayer for such a declaration is expressly made in the statement of claim. The defendant objects to such a declaration being made. I think the objection is well founded. In the absence of proper evidence and full opportunity to the defendant to meet such a claim the declaration now asked by the plaintiff ought not to be made.

For reasons given, it is my judgment that the plaintiff recover from the defendant the sum of \$112.00 with costs. The defendant does not ask to set off costs against the plaintiff, but foregoes that right.

Judgment for \$112 and costs.

Solicitor for the plaintiff: J. L. Cohen, Toronto.

Solicitors for the defendant: Beaton, Bell & Ross, Toronto.

[COURT OF APPEAL.]

Anderson v. Canadian National Railway Company.

Railways—Negligence—Protection of Level Crossings—Precautions to be Observed in Obstructing Highway—Proof of Negligence even where Statutory Requirements Observed—Necessity for Showing Special Circumstances Calling for Greater Precautions—Jurisdiction of Transport Board—The Railway Act, R.S.C. 1927, c. 170, ss. 255-257, 311.

The result of the decisions seems to be that in ordinary circumstances a railway is permitted to carry on its usual operations in the normal way at a level highway crossing, without other precautions and warnings than are prescribed by The Railway Act, or by the Transport Board in the exercise of its jurisdiction thereunder, but that, if the operations are carried on in such a way, or are of such a character, that the public using the crossing is exposed to unusual danger, or if there are special circumstances that render ineffective or insufficient the precautions and warnings generally prescribed, it may be left to a jury to say whether or not the railway has been negligent in failing to adopt other measures for the protection of those who may use the crossing. A jury is no more entitled to find that such special circumstances existed, in the absence of evidence, than it is to say that the precautions and warnings prescribed by statute or by the Board are not sufficient for ordinary occasions. The mere fact that a night is dark is not an exceptional circumstance requiring additional precautions, such as the placing of lighted flares beside a train or car standing across the highway at such a crossing.

AN appeal by the defendant from the judgment of Kelly J., entered upon the findings of a jury.

11th and 12th January 1944. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and GILLANDERS J.J.A.

D. L. McCarthy, K.C., (L. Z. McPherson with him,) for the defendant, appellant: The appellant's motion for non-suit should have been allowed by the trial judge, on the ground that there was no evidence of negligence on the part of the appellant which could be properly submitted to the jury. The statement of claim contained certain allegations of negligence which were negatived by the jury. The negligence that was found by the jury is not actionable negligence. There is no evidence that the employees of the appellant knew of uncommon conditions calling for the exercise of special care, and the trial judge should have instructed the jury that in the absence of evidence that the appellant's employees knew of the danger, they were under no duty to take any special precautions. The trial judge should have instructed the jury that there was a duty on the part of the driver of the automobile to observe the railway crossing signs, and that his neglect to do so was negligence on his part. The appellant has complied with all the statutory duties imposed upon it by virtue of The Railway Act, R.S.C. 1927, c. 170. There is nothing in

the regulations of the Transport Board which necessitates the placing of a flagman at a crossing. In effect, the jury have found that on a dark night, while cars are being shunted, flares or lights must be used. The jury has no right to say what precautions are to be taken at this crossing on a dark night while cars are being shunted: *The Grand Trunk Railway Company of Canada v. McKay* (1903), 34 S.C.R. 81, 3 C.R.C. 52. The railway company fulfilled its statutory duty and surely it is not reasonable, having all the circumstances in mind, to impose an additional duty: *City of London v. Grand Trunk R.W. Co.* (1914), 32 O.L.R. 642 at 664-5, 20 D.L.R. 846, 18 C.R.C. 174; *Hendrie v. Grand Trunk Railway Co.* (1921), 51 O.L.R. 191, 67 D.L.R. 165, 29 C.R.C. 72. The men in charge of the train had the right to assume that the driver of this car would see a railway crossing sign five hundred feet before the crossing, and that consequently he would slow his car to twenty miles per hour or less. Should reasonably careful, competent men have done anything in addition to what was in fact done? The answer of the jury is not one to which the Court can give effect. It was practically a recommendation made by the jury concerning this particular crossing. The trial judge erred in his charge to the jury in failing to instruct them that in the absence of evidence that the appellant's servants knew of the danger, they were under no duty to take any special precautions.

J. R. Cartwright, K.C., (Ross W. Gray, K.C., with him,) for the plaintiff, respondent: The finding of the jury is amply supported by the evidence, and when read in the light of the pleadings, the evidence and the charge of the trial judge, it supports a judgment for the respondent. The situation was properly put before the jury, and they have properly found that in these circumstances it was negligence on the part of the appellant to have this car in a stationary position completely blocking the highway without taking any steps to warn approaching traffic. When the railway company stopped a dark car on a dark night on a provincial highway, there should have been a warning to approaching traffic. The onus is on the appellant to prove that it was not negligent: *Pleet v. Canadian Northern Quebec R.W. Co.* (1921), 50 O.L.R. 223 at 227, 64 D.L.R. 316, 26 C.R.C. 227. [ROBERTSON C.J.O.: That is not quite the case this time.] If it is shown that the railway car was standing still, it was for the jury to say whether it was reasonable to

leave it there without some warning. The question which this Court puts to itself is whether a jury acting reasonably might come to the conclusion it did. If so, the Court should not interfere. [ROBERTSON C.J.O.: Was the trial judge not bound to tell the jury that it was the duty of the driver of the car to see the sign? He did not discuss that aspect with the jury.] One must consider the charge as a whole, and the trial judge did put to the jury the question of negligence or no negligence on the part of the driver. In the circumstances of this case, the question of negligence or no negligence on the part of the appellant, and the question whether the driver of the automobile was guilty of contributory negligence, were questions of fact for the jury: *McLean v. McCannell*, [1938] O.R. 37, affirmed [1937] S.C.R. 341, [1937] 2 D.L.R. 639; *Tidy v. Battman*, [1934] 1 K.B. 319. In construing the findings of the jury the Court should not be too critical, and if on a fair interpretation of them they can be supported upon a reasonable view of the evidence, effect should be given to them: *McCannell v. McLean*, [1937] S.C.R. 341 at 344, [1937] 2 D.L.R. 639; *C.N.R. v. Muller*, [1934] 1 D.L.R. 768, 41 C.R.C. 329. It is not sufficient that the appellant claims to have complied with the statutory provisions and orders as to signs and other warning signals. There is still a common law duty upon the railway company to take care in any particular circumstances calling for special care; and failure to take such care as is reasonable in any particular set of circumstances is actionable negligence: *Montreal Trust Co. v. Canadian Pacific Railway Co.*, 61 O.L.R. 137 at 141, [1927] 4 D.L.R. 373, 33 C.R.C. 407. The appellant has maintained that the negligence found by the jury was not pleaded by the respondent, but paras. 5 and 6 of the statement of claim do sufficiently plead negligence. [ROBERTSON C.J.O.: But where is there any allegation of special circumstances that might call for extra precautions by the railway-men? The jury found specific negligence, which negligence may not have been sufficiently pleaded in the statement of claim, a circumstance commented on by Masten J.A. in *Burrows v. Canada Bread Co. Ltd.* (1929), 37 O.W.N. 281 at 283.] The fact that the driver of the car may have been somewhat negligent does not disentitle the respondent to recover against the appellant when the latter by the exercise of ordinary care and caution might have avoided the consequences of the driver's negligence: *Robinson v. New Brunswick Railway Company*

(1883), 23 N.B.R. 323, reversed 11 S.C.R. 688; *Luck v. Toronto R.W. Co.* (1920), 48 O.L.R. 581, 58 D.L.R. 145. The true cause of this accident was the negligence of the appellant's servants: *Keetch v. Brown* (1937), 7 Fortnightly Law Jo. 166.

D. L. McCarthy, K.C., in reply: The offending driver in this case gives no reason for failing to observe the warnings. His excuses for failing to see the railway car in no way excuse him for not seeing signs. There was no evidence offered as to the length of time during which the railway car was stationary. It might have just arrived or have been just leaving. The driver of this car disregarded the warnings placed near the crossing for his protection, and his negligence is the cause of the accident.

Cur. adv. vult.

11th February 1944. ROBERTSON C.J.O.:—This is an appeal by the defendant in the action from the judgment of Kelly J., dated 14th September 1943, at the trial of the action before him at Sarnia, with a jury. By the judgment in appeal the plaintiff was awarded damages in the sum of \$11,461.87, in respect of injuries received in an accident at a highway crossing on the line of appellant's railway.

On the night of 16th December 1942 the respondent was a passenger in a motor car owned and driven by one Rudolphe Gagne. The motor car was travelling easterly from Sarnia to London on provincial highway no. 7. A few miles east of Sarnia the highway crosses, at rail level, the appellant's line of railway from Sarnia to Stratford. There are the usual signs on the highway, warning of the railway crossing, but the driver of the car did not see them. Neither did he see, until he was right upon it, a freight car, with engine and tender attached, which was standing on the railway crossing as he approached it. The motor car collided with the freight car, and the respondent, who was sitting in the front seat with the driver, sustained serious injuries in the collision.

In her statement of claim the respondent alleged, in para. 5, that the appellant, its agents, servants or employees, had negligently halted a train across the highway, composed, in part, of cars used for hauling sugar-beets. In para. 6 it is alleged that the appellant, its agents, servants or employees, neglected

to give any warning whatsoever of the position of the car or cars across the highway, nor was there any adequate sign or warning of the existence of said railway crossing, or any protection against same. It is further alleged, in para. 7, that appellant's train was permitted to stand on the highway for a period of time longer than that permitted by statute, and s. 311 of The Railway Act, R.S.C. 1927, c. 170, is pleaded. Then, in para. 10, it is alleged that the accident was caused by the negligence of the appellant, its agents, servants or employees, and para. 11 alleges that the negligence consisted of—

“(a) Failure to have any adequate sign or warning of the existence of the railway crossing.

“(b) Failure to have any flagman stationed in a position on the highway to warn traffic of the danger.

“(c) Permitting the cars to stand on the highway for a longer period than that permitted by Statute.”

The following are the questions put to the jury and their answers:—

“1. Was there any negligence on the part of the defendant or its servants which caused or contributed to the plaintiff's injuries? Answer yes or no. A.—Yes.

“2. If so, in what did such negligence consist? A.—Should have taken some precaution on a dark night while shunting cars, showing lights or flares while cars are standing still on highway.

“3. Was there any negligence on the part of Rudolphe Gagne, the driver of the car in which the plaintiff was a passenger, which caused or contributed to the plaintiff's injuries? Answer yes or no. A.—No.

“4. If you answer the third question 'yes', then in what did such negligence consist? Answer fully.

“5. If you find there was negligence on the part of both the defendant and Rudolphe Gagne, state the degree of fault or negligence of each. The defendant's..... Rudolphe Gagne.....

“6. In what amount do you assess the total damages of the plaintiff? A.—\$11,461.87.”

The jury did not find negligence in any of the particulars alleged in para. 11 of the statement of claim, and are to be deemed to have negatived any such negligence. It may be, how-

ever, that the jury's answer to the second question, liberally interpreted, is a finding that appellant was guilty of negligence within para. 6 of the statement of claim.

For the appellant it is urged that in its answer to question 2 the jury exceeded its functions, and assumed to lay down a rule for shunting operations that is entirely outside its province, and that the answers of the jury are not a finding of negligence in law. In that connection attention is called to the fact that the statement of claim nowhere alleges that there were any special or unusual circumstances that required the adoption, on the part of appellant or its servants, of more than the ordinary precautions prescribed by statute at highway crossings.

The railway, at the place of the accident, is passing through open farming country. There is no railway station at this point. The railway has, however, a siding that runs off its through line, just to the north of the highway crossing. It is said that among other purposes the siding is used for placing cars to be loaded with sugar-beets, and there is a road on the railway right-of-way that runs parallel to the siding, no doubt for convenience in loading and unloading. The car with which the motor car collided was the first car behind the engine and tender, in a train that had been carrying on shunting operations for a little while prior to the accident, and at the moment of the collision the engine, headed to the south, was stationary, with its headlight on. Attached to it was the tender, also carrying lights, and the car that stood across the pavement came next, with other cars extending behind it to the north. The appellant called no witnesses, and there is no evidence in regard to the movements of the train before the accident, beyond the statement of a witness that he had heard it shunting, as it usually did in the evening. Neither is there any evidence of the length of time the train had been standing on or otherwise obstructing the highway, nor of the reason for stopping it there, nor what its next operation was to be.

No question is raised as to the right of the appellant to operate its railway across the highway at the place of this accident, nor of its right to have and to use the railway siding immediately to the north of the highway, and to do ordinary shunting of cars, as the business of the railway may require at this point. The case for the respondent substantially rests upon the alleged existence, at the time, of unusual or extraordinary conditions

that made it a negligent act on the part of the appellant to have at this time a freight car, or this particular freight car, standing across the highway without supplying more than the usual means of warning travellers using the highway of its presence.

There was on the highway, 500 feet west of the railway crossing, and a little to the south of the pavement, a large white sign, of a standard design, placed there by the Department of Highways, and bearing the words "Railway Crossing 500 feet, speed 20 miles." There was another sign immediately at the crossing, as required by s. 267 of The Railway Act. These signs, and the lights on the engine and tender, were there to be seen, and I do not understand that it is contended that The Railway Act, or the orders of the Board of Railway Commissioners, specify anything more in the case of a train engaged in shunting operations.

S. 311 of The Railway Act deals particularly with the obstruction of highways by permitting engines, tenders or cars to stand on highway crossings, and is as follows:—

"Whenever any railway crosses any highway at rail level, the company shall not, nor shall its officers, agents or employees, wilfully permit any engine, tender or car, or any portion thereof, to stand on any part of such highway, for a longer period than five minutes at one time, or in shunting, to obstruct public traffic for a longer period than five minutes at one time, or in the opinion of the Board, unnecessarily interfere therewith."

Our attention has not been called to any order of the Board on the matter referred to in the latter part of the section. This is not a crossing where any special protection has been prescribed under s. 257, or any other provision, of The Railway Act. There is no evidence that public traffic had been obstructed on this highway by appellant's train, or by any part of it, for a longer period than five minutes, at this time, and the answers of the jury, who made no finding against the appellant in that respect, dispose of the charge definitely made by respondent in clause (c) of para. 11 of the statement of claim.

In the circumstances of this case, did the appellant owe the respondent a duty to take some precaution on a dark night while shunting cars, such as showing lights or flares, while cars were standing on the highway? It will not be doubted, I think, that a railway company, such as appellant, has no more liberty than anyone else to be negligent. In *Imerson v. Nipissing Central*

Railway Co., 57 O.L.R. 588 at p. 593, [1925] 4 D.L.R. 504, Masten J.A., in speaking of the matter of the speed at which the car of the railway company was travelling, said, "But the absence of any statutory limitation of speed does not absolve the defendant from its common law liability if it is negligent, and it still remains liable for negligence if, 'having regard to all the circumstances of the case, its employees omit that reasonable degree of care which the law justly requires of those who, in the exercise of their rights, are using an instrument of danger'." The latter part of this statement is quoted from the judgment of King J. in *Fleming v. Canadian Pacific Railway Company* (1892), 31 N.B.R. 318 at p. 345, which was adopted by the Supreme Court of Canada on appeal in (1893), 22 S.C.R. 33.

This principle has been applied in cases of accidents at highway crossings, two of which may be referred to as illustrations. First is *The Lake Erie and Detroit River Railway Company v. Barclay* (1900), 30 S.C.R. 360. In that case shunting operations were carried on near a highway crossing, and a train of cars was sent across a much frequented highway by what was called a "flying switch", the engine being detached and the cars proceeding by their own momentum. It was held that it was properly left to the jury whether it was not necessary, at that particular time and under the particular circumstances, to take greater precautions than were taken, and to be much more careful than in ordinary cases where these conditions did not exist. In *Montreal Trust Co. v. Canadian Pacific Railway Co.*, 61 O.L.R. 137, [1927] 4 D.L.R. 373, 33 C.R.C. 407, there was evidence that some box-cars of a freight train, placed on a passing-track to allow a passenger train to proceed on the main line, obstructed the view which the driver of a motor car would otherwise have had of the approaching passenger train. It was held that it was proper to submit to the jury the question whether, in the circumstances of the case, a duty was cast upon the railway company to take some precaution additional to the precautions prescribed by The Railway Act, and that it was open to the jury to find that the omission to take extra precaution was negligence.

There is nothing in the decisions in such cases as these I have referred to, in any way inconsistent with the principle laid down in *The Grand Trunk Railway Company of Canada v. McKay* (1903), 34 S.C.R. 81, 3 C.R.C. 52. In that case Davies J.

(in whose judgment the Chief Justice and Killam J. concurred), said, at p. 97, referring to the powers conferred by The Railway Act upon the Railway Committee of the Privy Council, of determining the character and extent of the protection which should be given to the public at level highway crossings: "I cannot think that these powers, so full, so complete, and so capable of being made effective, can if exercised be subject to review either as to their adequacy or otherwise by a jury, nor do I think that failure to invoke the exercise of the powers is of itself sufficient to take the matter away from the jurisdiction to which Parliament has committed it and vest it in a jury."

The result of the decisions seems to be that, under ordinary circumstances, the railway is permitted to carry on its usual operations in the normal way, at a highway level crossing, without other precautions and warnings than are prescribed by The Railway Act or by the Board, but if the operations are carried on in such a way, or are of such a character, that the public using the crossing is exposed to exceptional danger, as in the *Barclay* case, or if there are exceptional circumstances, as in the *Montreal Trust Co.* case, that render ineffective or insufficient the precautions and warnings generally prescribed, then, in such cases, it may be left to a jury to say whether or not the railway has been negligent in failing to adopt other measures for the protection of those who may use the crossing.

As I have already stated, the statement of claim does not allege anything exceptional, either in the character of the operations or the manner in which they were carried on, or in the circumstances existing at the time, that called for special care or precaution on this occasion. There were, of course, no unusually dangerous operations being carried on by the appellant at the time of the accident, for the train was standing still. As to exceptional circumstances existing at the time, there being none alleged in the statement of claim it is necessary to go to the charge of the learned trial judge and the answer of the jury to the second question, to discover what there was in the way of exceptional circumstances, that, in the opinion of the jury, called for the exercise of more than ordinary care on the part of appellant's servants. The trial judge put it to the jury, if they thought there was something extraordinary about the night, were they (appellant's servants) called upon to use any extra precaution? I am unable, however, to discover in the

charge to the jury any instruction to the jury that, unless there were exceptional circumstances of such character that extra precaution was called for, compliance by appellant with the statutory requirements was sufficient. He referred to them as the minimum requirements. At the most, it is only by inference from the jury's answer to the second question that the conclusion can be drawn that the jury did consider that the darkness of the night was an exceptional circumstance. They do not say that it was, and the jury not having been instructed that the statutory precautions must be considered as adequate except in special circumstances, the inference may be unwarranted.

It is, of course, a matter of evidence whether, in any particular case, there are exceptional circumstances present that call for extra precaution. A jury has no more right to say that the circumstances are exceptional, without evidence to establish it, than it has to say that the precautions and warnings prescribed by statute or by the Board are not sufficient for ordinary occasions. There is evidence here that this was a dark night. The doctor who was called to the scene of the accident says that "it was quite a dark night, rather cloudy." There was no rain nor snow falling and there was no fog nor other atmospheric conditions to prevent the crossing sign being seen. Some of the witnesses speak of their difficulty in distinguishing the car with which the motor car had collided, against the background of the pavement, as they approached it, but this difficulty they attributed to the fact that the car was very dark or black in colour, and that the pavement was the same colour, rather than to the darkness of the night. Neither the driver of the motor car nor the respondent saw either of the crossing signs, as they approached the railway crossing, but they do not say that it was because of the darkness of the night, nor does any witness say that the crossing signs could not be seen readily by anyone who kept a look-out. It is also to be noted that the darkness was not such as to prevent the driver of the motor car keeping up a speed of from 30 to 35 miles per hour on a road with which he was not familiar.

In my opinion there was no evidence in this case upon which it could reasonably be found that the darkness of the night was an exceptional circumstance of a character to require extra precaution being taken by appellant's servants in charge of the train, for the protection of travellers on the highway.

There is no evidence that the crossing sign placed at the crossing by the appellant, as required by The Railway Act, and the sign 500 feet to the west of the crossing, put there by the Department of Highways, were not both to be readily seen by a careful traveller, and so long as they are in place and serving this purpose as warning signs, the very warning is given that the statute contemplates as a sufficient one. So far as the evidence shows, the two crossing signs were, on this occasion, as distinctly to be seen as on any night. A greater burden is not to be cast upon the appellant merely because, in this instance, a careless driver proceeded at high speed and did not look for road signs on an unfamiliar road.

The terms in which the jury expressed its finding would seem to be more consistent with an intention on its part to state the rule that should govern the conduct of railway men on dark nights generally, rather than a finding based upon any exceptional circumstance in the darkness of this night in particular. It is for all dark nights that extra precaution is prescribed. Such a view of their finding is also more consistent with the evidence as to the character of this night. Without finding the existence of any special circumstances to warrant it, the jury sought to add to the precautions to be observed in shunting operations that have been prescribed. All nights are dark—more or less—and it would add greatly to the difficulties of operating a railway if, on every night that a jury may afterwards consider to have been a dark night, extra precaution must be taken at all the level highway crossings throughout Canada. If standing trains require on dark nights to take extra precautions, moving trains are even more dangerous.

On the argument before this Court counsel for the respondent mentioned other matters that he contended might be considered as special circumstances in this case. The dark-coloured freight car standing against the dark pavement was one; the shunting operations carried on, not at a railway station but at an isolated siding where there were no lights, such as are usually about a railway yard. These were the principal ones mentioned. I do not see, however, in view of the express mention of a dark night by the jury in its answer to question 2, that it is permissible to give any weight to these other suggestions. Evidently the jury did not. It would certainly increase the embarrassment of the train hands in their efforts to operate

within the law, if they had to consider, when engaged in shunting operations, how a particular car would contrast with its background, if it should stand momentarily on a highway crossing.

In my opinion the finding of the jury will not support the judgment. There is no finding of neglect by the appellant's servants of any duty imposed upon them on the occasion in question, and the action fails.

It is proper that I should add that the jury's answer to the third question, finding no negligence on the part of the driver of the car is, I think, one that cannot be supported on the evidence. Neither the driver of the motor car nor the respondent gave any explanation of their failure to see the crossing signs. It is obvious that if the driver had seen the highway sign 500 feet to the west of the railway, and had then reduced his speed to 20 miles per hour, his chance of seeing the train and of stopping in time to avoid a collision would have been greatly improved, for he would have proceeded, not only more slowly, but in the knowledge that a railway crossing was in front of him, for which he must look out. As it happened, he also failed to see the lights on the engine and tender. He was plainly careless and negligent in maintaining a speed of 30 to 35 miles an hour, in the circumstances, and in failing to keep a proper look-out. There are cases where a driver should so regulate his speed that he can bring his car to a stop within the range of his vision, and this may well be considered as one such case.

The appeal should be allowed with costs, and the action dismissed with costs.

HENDERSON J.A.:—I agree with the opinions of my Lord the Chief Justice and my brother Gillanders, both in the result and in their reasons therefor, and need add nothing more.

GILLANDERS J.A.:—The defendant appeals from a judgment of Kelly J. after trial with a jury. The action arose from a collision between a motor car, in which the respondent was a passenger, and a train standing on a highway crossing. The respondent was housekeeper for one Gagne, who had moved to the City of Sarnia from northern Ontario about 2nd December 1942.

About 8.30 in the evening of 16th December, Gagne left to drive a soldier friend to London, and the respondent went along, sitting in the front seat beside Gagne, who was driving. The

paved highway on which Gagne was driving, known as the London Road, runs east and west, and just outside the city of Sarnia it is crossed almost at right angles by a single-track line of the appellant railway. Gagne was not familiar with the crossing or the locality.

Driving west on the highway at a speed of 30 to 35 miles per hour, Gagne ran into a freight car of the type used for transporting sugar-beets. The freight car was part of a train which, at the time of the accident, was stopped with this car across the highway. There is no evidence as to how long the train had been stopped; nothing except that it was stopped at the moment of the collision. The night was said to be dark at the time, but there was no rain, snow, mist, or fog, to affect visibility. A small amount of snow lay on the ground, but very little, if any, on the pavement. On the sides of the highway, both east and west of the railway crossing and at a distance of 500 feet from the crossing, stood railway crossing signs. These were of common design, consisting of an upright standard bearing crossed arms. The whole was painted white, and the arms bore the wording: "Railway crossing 500 feet, speed 20 miles." Another railway crossing sign, similar in design, stood on the south side of the highway immediately to the east of the crossing. This was the direction from which Gagne approached. Neither he nor the respondent saw either of the warning signs east of the crossing, and neither saw the obstruction on the highway until almost the instant of the collision. Neither, apparently, knew before the crash that it was a train. No reduction had been made in the speed of the motor car at the time of the collision, which was severe, and resulted in serious injuries to the respondent.

The evidence of witnesses who came to the scene after the accident indicates that the pavement was dark, made darker by dampness, and that the freight car was dark in colour and seemed to blend in with the colour of the pavement, making it difficult on approaching to distinguish the obstruction. A short distance north of the highway a siding runs from and along the west side of the main railway line. The engine of the train was immediately south of the crossing and apparently attached directly to the car which was across the highway at the time of the collision. A Provincial Police officer, who was called after the accident, observed this, and testified that he could see "the

front light of the engine shining up in the darkness." A witness who lives in the vicinity of the accident, who had not heard the collision but came over to the scene after being told about it, testified that he had heard the train shunting there for 10 to 15 minutes, and that this was usual almost every night. He had not seen the train in question before the accident, and his conclusion was based on what he heard. Evidence was also adduced and admitted from this witness that on several occasions during shunting operations he had seen flares placed in posts close to the railway tracks, and that these gave a bright red light. On cross-examination it appeared that he had not seen a flare "since last sugar-beet time" and was not sure that he had seen one in the last year. No evidence was adduced as to the purpose for which they had been placed.

In answer to questions submitted to them, the jury found that the appellant railway company was guilty of negligence and specified such negligence as follows: "Should have taken some precaution on a dark night while shunting cars, showing lights or flares while cars are standing still on highway." They absolved Gagne, the driver of the motor car, from negligence, and assessed the respondent's damages at \$11,461.87, for which amount judgment was subsequently entered in her favour.

The main question raised by the appeal is whether or not the negligence found by the jury amounts to negligence in law.

If the finding of negligence made against the appellant can stand, then the finding absolving the driver of the motor car from blame, in my opinion, calls for consideration, but that is subsidiary to the first question whether there is any evidence on which a finding of actionable negligence against the appellant can be based.

It is admitted that there is no evidence indicating any breach by the appellant of any statutory provision or order or regulation respecting signs or warnings. It is urged that there is still a common law duty upon the appellant railway company to exercise reasonable care in any particular set of circumstances, and that failure to do so is actionable negligence; and that it is for the jury to determine whether or not in the circumstances there was or was not such negligence. It is doubtful whether there is any evidence of "shunting" which involved obstruction of the highway crossing, but in any event the accident here could not be said to be caused by shunting. At the most that would

be a *causa sine qua non*, not a *causa causans*. At the moment of impact the train was not moving but standing still.

S. 311 of The Railway Act, R.S.C. 1927, c. 170, prohibits a railway from permitting an engine, tender or car, or any portion thereof, to stand on any part of a highway for a longer period than five minutes at one time, or, in shunting, to obstruct public traffic for a longer period than five minutes at one time, or, in the opinion of the Board, unnecessarily interfere therewith. The obstruction of a highway crossing from time to time may reasonably be considered to be incidental to the operation of the railway.

Under ss. 255 to 257 of The Railway Act, full power and discretion is vested in the Railway Board (now The Board of Transport Commissioners for Canada, *vide* The Transport Act, 1938, 2 Geo. VI., (Dom.) c. 53, s. 3) to make provision for the safety and convenience of the public by imposing such terms and conditions as they may think proper in respect of highway crossings. The Board possesses such powers in giving leave for the construction of a railway crossing under s. 256, or in providing for such protection with reference to existing crossings under s. 257. *Inter alia*, it is provided that the Board may "order . . . watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction. . . ."

In *The Grand Trunk Railway Company of Canada v. McKay* (1903), 34 S.C.R. 81, 3 C.R.C. 52, the jury found the railway company negligent "in running too fast, and for the want of a flagman or gates." Sedgewick J., after referring to the provisions of The Railway Act, and concluding that "there is no limitation to speed unless it is prescribed by the Railway Committee", discusses the question of the flagman, and expresses the opinion that the duty to keep a flagman was a duty which could only be imposed by the proper tribunal created by the statute. Davies J., after referring to the powers vested in the Railway Committee at that time, says, at p. 97: "I cannot think that these powers, so full, so complete, and so capable of being made effective, can if exercised be subject to review either as to their adequacy or otherwise by a jury, nor do I think that failure to invoke the exercise of the powers is of itself sufficient to take the matter away from the jurisdiction to which Parliament has committed it and vest it in a jury." Davies J., however, points out, after referring to the case of *The Lake Erie and Detroit River Rail-*

way Company v. Barclay (1900), 30 S.C.R. 360, that "It by no means follows from the present judgment of this court that railway companies might not be properly adjudged guilty of actionable negligence in cases arising out of shunting cars across highway crossings apart altogether from questions relating to the speed of trains and the legality of their fencing at highway crossings. These cases must be dealt with on their merits as they arise."

Cases are not lacking where it has been recognized that liability may arise from negligence at common law. See *The Napierville Junction Railway Company v. Dubois*, [1924] S.C.R. 375, [1924] 4 D.L.R. 188, 29 C.R.C. 419, and *Montreal Trust Co. v. Canadian Pacific Railway Co.*, 61 O.L.R. 137, [1927] 4 D.L.R. 373, 33 C.R.C. 407, where the question is carefully considered by Rose J. (now C.J.H.C.).

It is urged in the present case that there is evidence of circumstances on which the finding might be based, in the testimony indicating that it was a dark night and that the colour of the obstructing car blended with the colour of the highway, making it difficult to see.

Keeping in mind the fact that this Court should be careful at all times not to substitute its opinion for that of the jury based on reasonable evidence. I think it would be to disregard the principle discussed in *Grand Trunk v. McKay*, *supra*, to hold that there was evidence here of circumstances on which it was open to the jury to find negligence at common law. The mere fact that the accident happened at night, and that it was dark, cannot provide evidence of special circumstances which impose an additional burden. The power to make provisions for the protection of the crossing being a matter specifically vested in the Board by the statute, one must, I think, find evidence of some special circumstances to impose on the appellants a duty to take extra care. There is no evidence in this case that the train had been stopped across the highway for a sufficient length of time to provide the employees with an opportunity to set out lights or flares after the train stopped. There is no evidence of the purpose for which the stop was made, nor, as indicated above, evidence that in the course of operations up to that time the highway had been obstructed.

Hesitant as I am about interfering with the finding of a jury who have had all the facts before them, I fail entirely to find any evidence here on which a finding of negligence can be sup-

ported in law against the appellant company. If that conclusion is correct, it relieves the defendant from liability; but it is probably desirable briefly to consider the question of contributory negligence.

Gagne, the driver of the motor car, says that he had good lights, and he failed to see either of the crossing signs by the side of the road giving warning of the railway crossing, and failed to see the car itself obstructing his path. He did not know what he had hit except from information given to him after the accident.

There have been many cases where motorists have collided with unlighted objects on the highway at night in various circumstances. It is sufficient to note that a recent case in the Privy Council, *Stewart v. Hancock*, [1940] 2 All E.R. 427, indicates that there is no rule of law which prevents a motorist from recovering damages where he has run into a stationary unlighted object. Whether he was negligent is a question of fact, and each case must depend on its own facts. If this case involved no more than failure to see the freight car across the highway, it might be for the jury to consider whether Gagne's failure to do so amounted to negligence. The evidence of the blending of the colour of the freight car with the colour of the highway would be relevant evidence for the jury to consider on that point, but other important relevant facts are involved in this case. There is no question of the existence of the two white railway crossing signs on the side of the highway. There is no suggestion that they were not visible to anyone keeping a look-out. There is a complete absence of any explanation for not seeing either of these warnings. In these circumstances, to absolve the driver of the motor car from all blame would indicate failure on the part of the jury to appreciate the standard of care which it was Gagne's duty to exercise. If necessary, I would feel bound to hold that the finding in this respect is not supported by the evidence.

The appeal should be allowed and the action dismissed with costs, if demanded.

Appeal allowed with costs and action dismissed with costs.

Solicitors for the plaintiff, respondent: Cowan, Gray and Millman, Sarnia.

Solicitor for the defendant, appellant: A. D. McDonald, Toronto.

[MACKAY J.]

Martin v. Deutch et al.

Damages—Torts—Measure of Damages for Physical Injuries—Principles Applicable—Review of Authorities.

In assessing damages for physical injuries, the Court should consider: (1) the bodily injuries sustained by the plaintiff; (2) the pain and suffering undergone; (3) the effect on the plaintiff's health; (4) the pecuniary loss caused by inability to carry on his business; (5) any probable permanent, or partially permanent, disability effectively to carry on his business or calling; and (6) the disbursements or out-of-pocket expenses resulting from the injury.

The same principles of compensation apply whether the income lost is large or small. *Pym v. The Great Northern Railway Company* (1862), 2 B. & S. 759 at 768, referred to.

Phillips v. The London and South Western Railway Company (1879), 4 Q.B.D. 406, affirmed 5 Q.B.D. 78; *Bateman v. County of Middlesex* (1912), 27 O.L.R. 122, applied.

AN action for damages for injuries sustained by the plaintiff as a result of being struck by an automobile owned and operated by the defendants. This was the second trial of the action, and was limited to an assessment of damages. The earlier history of the action is fully set out in the reasons for judgment.

6th to 10th December 1943. The action was tried by MACKAY J. without a jury at Toronto.

E. A. Richardson, K.C., and B. O'Brien, for the plaintiff.

F. J. Hughes, K.C., and P. E. F. Smily, K.C., for the defendants.

22nd February 1944. MACKAY J.:—The plaintiff was injured on the 4th day of September 1939 by a motor car operated by the defendant Sarah Deutch and owned by the defendant W. G. Deutch.

This action was tried before Chevrier J. and a special jury at the Toronto Assizes on 9th, 10th, 11th, 12th, 13th, 15th, and 16th June 1942, when the jury found the defendants liable for the injuries caused to the plaintiff, and assessed the damages at \$165,000.

The defendants appealed to the Court of Appeal for Ontario (composed of Riddell, Fisher and Henderson, JJ.A.), the majority of which court dismissed the appeal, Henderson J.A. dissenting as to the quantum of damages: [1942] O.W.N. 583, [1942] 4 D.L.R. 529.

The defendants appealed to the Supreme Court of Canada. On 4th May 1943, the Supreme Court delivered judgment allowing the appeal as to the quantum of damages, and directing a

new trial, limiting the issue to an assessment of the damages sustained by the plaintiff (respondent): [1943] S.C.R. 366, [1943] 3 D.L.R. 305.

The new trial ordered by the Supreme Court of Canada was heard in the non-jury sittings at Toronto on the 6th, 7th, 8th and 9th days of December 1943.

The plaintiff, an engineer and tool-maker, fifty years of age at the time of the accident, in good health except for a slight deafness, was seriously injured by being hit by a motor car driven by the defendant Sarah Deutch and owned by the defendant W. G. Deutch.

The tibia and fibula in both legs were broken, involving compound and comminuted fractures. As a result the plaintiff has been completely incapacitated and in and out of hospital for well over four years, and has had many extensive operations, including bone-plating and grafting. Nine blood transfusions were administered during the course of these operations.

The following is a brief summary of his hospitalization, operative and other treatments:

1939.

Sept. 4 Date of accident. Taken to Hamilton Hospital, bones set and legs placed in troughs.
9 A Kirschner wire driven through each ankle for extension. Legs elevated and weights applied.

Oct. 6 Cast put on right leg.
28 Major operation, bone fragments in right leg wired together.

Nov. 8 Both legs in casts up to hips. Taken home.

Dec. 11 Returned to hospital at Hamilton. Casts taken off and new casts put on.

1940.

Mar. 13 Entered St. Michael's Hospital, Toronto.
14 Operation on right leg. Infection present; Tissues removed and cast replaced. A major operation lasting three hours.

April 11 Operation. Bone graft on fracture on left leg.

May 3 Casts removed.

June 13 Both casts removed and new casts applied.

July 26 Casts removed and new casts put on.

Aug. 14 Bone graft in left leg, operation lasting 4½ hours.

Sept. 26 Cast removed from right leg.
28 Walking cast put on this leg.
Dec. 21 Taken home.

1941.

Jan. 17 Returned to St. Michael's Hospital.
18 Operation to remove screws from right leg.
Feb. 1 Cast on left leg changed.
27 Operation on left leg, bone from fibula grafted into tibia.
May 22 Returned home with casts on either leg.
June 24 Returned to hospital, cast on left leg changed.
30 Walking cast on left leg.
Aug. 30 The first indication of incipient union.
Sept. 23 Union or slight union broken when plaintiff fell with walking cast, he being in the execution of doctor's instructions at the time.
Consultation by Dr. Harris, Dr. Gallie and Dr. Wilson,
Cast put back on.
Nov. 24 Bone graft operation at St. Michael's Hospital.

1942.

Jan. 26 Cast removed at St. Michael's Hospital indicating increasing density in bone but misalignment in right knee joint.
Feb. 27 Cast taken off left leg and new one put on.
Mar. 23 Cast removed from left leg and new cast put on left leg. Union in right leg increasing. None in left leg.
May 19 Cast removed from left leg. Some union in left.
June 2 Cast replaced on right leg.
27 Cast removed from both legs, full length cast put on both legs.
July 9 Dr. Wilson ill. X-rays taken and cast left on.
Aug. 25 Cast taken off right leg and X-rayed.
28 Dr. Gallie put walking casts on both legs. Started to move about by means of crutches.
Sept. 8 Examined by Dr. Gallie who ordered patient to carry on for further two weeks.
26 Saw Dr. Gallie at Medical Arts, who ordered patient to carry on another month.
Oct. 31 Dr. Gallie ordered plaintiff to return to Dr. Wilson.

Nov. 4 Examined by Dr. Wilson. Casts removed and returned home without casts. Union in left leg at last. Right leg increasing union, but suspicious line yet to be seen.

1942 }
 Nov. 9 }
 to }
 1943 }
 Jan. 21 } Treatment by masseuse, worked hard to limber up
 joint by means of operating stationary bicycle.

Jan. 23 Went south and made steady progress. Had three massage treatments weekly, and walking with aid of crutches.

April 24 Returned to Toronto.

April } Steady progress. Moving about house without aid of
 to } crutches.
 Sept. }

Nov. 1 Good strong union in both legs, but left leg more firmly united than right. Substantial loss of flexion in both knees. Prognosis according to the evidence is that in six months from 8th December 1943 plaintiff will recover as much as he will. He will never have full use of his feet.

Plaintiff was and is most co-operative and did everything within his power to aid his recovery.

Condition of plaintiff as of December 1943: Sinus at shin of right leg, probably due to pocket of infection. Dr. E. Robertson says "it should be left a year in the hope nature may repair." If not, then an operation is indicated.

As a result of a fracture of one of the bones of the right knee, prolonged activity on his feet is made dangerous, as the cartilage is impaired and continuous use would in five years cause rapid deterioration of the knee-joint likely to result in almost complete incapacity. If, on the other hand, the plaintiff is on his feet for but a few hours daily he can carry on in a limited way. Dr. Robertson says: "I don't think he will ever do more than six hours a day. He might do so in a year, but the right knee would deteriorate so that in five years he could do but two hours' work. Nature cannot compensate for this destruction of cartilage."

There is a terse and comprehensive appreciation of the law of damages in Gahan on the Law of Damages (1936), at p. 110:

"The assessment of damages for personal injuries is unusually difficult. Opinion will differ widely on the proper compensation for pain and suffering. Moreover, damages must be assessed once and for all. The possibility of a speedy and complete recovery has to be balanced against the possibility of serious complications in the future. It would be clearly wrong to award a plaintiff such a sum as would compensate him for the worst that could possibly happen, but the sum awarded should, in accordance with the general rule, put the injured party, so far as money can put him, in the same position as if he had not been wronged. Thus, regard would be had, in the light of medical and other evidence, to the probable duration of suffering and disability."

Phillips v. The London and South Western Railway Company, in the Divisional Court in 4 Q.B.D. 406, and in the Court of Appeal in 5 Q.B.D. 78. In the Divisional Court, Cockburn C.J. says, at p. 407:

"It is extremely difficult to lay down any precise rule as to the measure of damages in cases of personal injury like the present." The judgment goes on:

"No doubt, as a general rule, where injury is caused to one person by the wrongful or negligent act of another, the compensation should be commensurate to the injury sustained. But there are personal injuries for which no amount of pecuniary damages would afford adequate compensation, while, on the other hand, the attempt to award full compensation in damages might be attended with ruinous consequences to defendants who cannot always, even by the utmost care, protect themselves against carelessness of persons in their employ. Generally speaking, we agree with the rule as laid down by Brett J. in *Rowley v. London and North Western Railway Company* (1873), L.R. 8 Ex. 221, an action brought on Lord Campbell's Act, 9 & 10 Vict. c. 93, that a jury in these cases 'must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider under all the circumstances a fair compensation.'

In the Court of Appeal report, 5 Q.B.D. 78 at 79, there is a quotation from the charge of Field J. to the jury, at the trial:

"But it has been pointed out for centuries, and it is the principle of foreign jurisprudence as well as ours, that in actions for personal injuries of this kind, as well as in many others, it is wrong to attempt to give an equivalent for the injury sustained. I do not mean to say that you must not do it, because you are the masters and are to decide; but I mean that it would operate unjustly, and in saying so I am using the language of the great Baron Parke, whose opinion was quoted with approval in *Rowley's* case. Perfect compensation is hardly possible, and would be unjust. You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. Dr. Phillips can never sue again for it. You have, therefore, now to give him compensation, once for all. He has done no wrong; he has suffered a wrong at the hands of the defendants, and you must take care to give him full, fair compensation for that which he has suffered."

Later, at p. 81, Field J., when speaking of loss of future income, says:

"I say also that you are not to give the value of an annuity of the same amount as the plaintiff's average income for the rest of the plaintiff's life. If you gave that you would be disregarding some of the contingencies. You must take all things into consideration, and endeavour to see if you can what is the proper mode of dealing with them. An accident might have taken the plaintiff off within a year. He might have lived, on the other hand, for the next twenty years, and yet many things might have happened to prevent his continuing his practice. If it had been a question of trade or business, bankruptcy might have supervened. . . . It is given, recollect, once for all, and once only, you must not forget that, and it must be given on the fairest estimate you can make of what the probable continuance of the plaintiff's professional income would have been."

In *Mayne on Damages*, 10th ed., p. 450, it is stated:

"Any permanent injury, especially where it causes a disability from future exertion, and consequently pecuniary loss, is also a ground of damage. This is one of the cases in which damages most signally fail to be a real compensation for the loss sustained. In one case [*Arnsworth v. The South-eastern Railway Company* (1847), 11 Jur. 758] Parke B. said, 'It would

be most unjust if, whenever any accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done. Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life'." The learned editor, in this connection, cites *McDade v. Hoskins et al.* (1892), 18 V.L.R. 417.

In *Bateman v. County of Middlesex* (1912), 27 O.L.R. 122, 6 D.L.R. 533, Garrow J.A. said:

"What is a reasonable sum is always to me a difficult question, from answering which I would gladly escape if consistent with my duty. The principles deducible from the cases of authority upon the measure of damages do not, in my experience, go very far in helping one except along general lines. The real difficulty is, that, within these lines, there is almost always so much reason for honest difference of opinion."

In an assessment of damages it is well to consider:

- (1) the bodily injuries sustained;
- (2) the pain and suffering undergone;
- (3) the effect on the health of the sufferer according to its degree;
- (4) the pecuniary loss due to inability to carry on his business;
- (5) probable prospective permanent or partially permanent disability, due to the accident, effectively to prosecute the plaintiff's business or calling; and
- (6) disbursements or out-of-pocket expenses due to the injury.

Prior to 1939, when the accident occurred, the plaintiff's net profit had steadily increased. In 1936 it was \$11,550.47; in 1937, \$11,210.18; in 1938, \$18,520.95. At the end of 1938 the plaintiff sold out to his partner for a further sum of \$40,000, with the intention of starting at a later time on his own in the same kind of business.

One Mr. Corman, who was engaged in the same line of business, was called, and attested that in 1939 his fixed and liquid assets were from \$35,000 to \$40,000. In 1939 his plant was taken over by the Dominion Government and he was paid a salary:

"Q. Now, Mr. Corman, what salary were you drawing in 1938 or '39? A. I didn't draw a salary; we weren't a limited

ERRATUM.

P. 192, 4th line from bottom, the sentence commencing "In 1939" should read as follows:

"In 1939 his plant became engaged in the manufacture of war equipment, and the following arrangements were made."

company, you understand, all our profit was mine and I guess you would call that salary.

"Q. Is your present salary approved by the government?
A. Yes.

"Q. At what? A. I have only this reservation, that for the war effort and for the gossip and a lot of things I wouldn't want it to go out of this room: My salary has been approved by the Income Tax Department at Ottawa after thoroughly analyzing my ability, if I may say that, and the high class work we are doing.

"Q. How are the men in that type of business rated at Ottawa—what do they call you. You may not like to say?

"MR. HUGHES: Dollar a year men? A. I am placed with . . .

"Q. There is a category, is there, of men of your ability?
A. Yes. The men in Ottawa are registered as mechanical geniuses.

"Q. That is how they fix your salary? A. They fix my salary on that.

"Q. At what? How much? A. \$30,000.

"Q. Well then you have told us what your fixed assets were in 1939. Will you tell us what they were at the end of 1942? Are the government inspectors in your plant often? A. They stay all the time.

"Q. But I mean the government auditors? A. No. They come in about once a month.

"Q. And are your figures all subject to their scrutiny? A. Yes.

"Q. And is this statement available to them? A. Yes.

"Q. And they know what you are getting and what you are not getting? A. Yes. They know everything.

"Q. What are your fixed assets at the end of 1942? A. If I was as good an accountant as I think I am an engineer I could read these. My fixed assets \$275,000 . . .

"MR. HUGHES: My Lord, I suppose you don't mind receiving that subject to my objection? It has gone so far I cannot follow it and I don't want to take so long to record objections.

"Q. What were your fixed and liquid assets? A. \$375,000.

"Q. That has nothing to do with your salary? A. No.

"Q. And I believe your wife is your bookkeeper? A. Yes.

"Q. At a salary? A. Yes.

"Q. What about your depreciation. What have you been permitted to do, as to machinery, for instance? A. Oh, in machinery—all machinery that we bought in 1940 we were allowed to write it off fifty per cent. in 1940 and fifty per cent. in 1941, and likewise the machinery that we bought in 1941 we wrote fifty per cent. off in '41 and fifty per cent. in '42. They allow us two years and we own the machinery. That is allowed before excess profits.

"Q. That is allowed before excess profits? A. Yes.

"Q. So if in 1941 you bought a hundred thousand dollars' worth of machinery, before any excess profits for 1941 would apply you would write off \$50,000 for machinery? A. That is right.

HIS LORDSHIP: "Q. I suppose the usefulness of the machinery is not in any way impaired in two years, is it? A. Well it is some but not very much.

MR. RICHARDSON: "Q. What if you do any repairs? Any repairs done to machinery, what is that charged to? A. Well that comes out of your excess profits. I mean you are allowed to repair your machinery before figuring excess profits."

It is argued by Mr. Richardson, on the authority of *Clinton v. County of Hastings* (1923), 53 O.L.R. 266, that such evidence is not too remote and should be used as a standard to determine the proper quantum. With this contention I cannot agree. There are many factors liable to intervene in these temporary departmental assigned contracts. Moreover, I have gathered during the course of this trial too high an appreciation of the character and integrity of the plaintiff to conclude that he would demand or be a party to receiving such tremendous sums especially when the rest of mankind is paying tribute.

Basing my conclusion on the principles of law laid down for the guidance of trial courts, and bearing in mind that the same principles of compensation should be applied whether the income lost is large or small (*Pym v. The Great Northern Railway Company* (1862), 2 B. & S. 759 at pp. 768-9, 121 E.R. 1254), there is nevertheless ample warrant in the authorities for moderating the dictates of logic in the face of the exigencies of affairs and in compliance with the teaching of experience.

Having regard to the foregoing, and considering and taking into account the before-mentioned heads of damage, and all other proper considerations, I assess the damages suffered by the plain-

tiff, exclusive of out-of-pocket disbursements, at \$96,500.00, less \$600.00 received from sale of motor car under execution, which leaves the sum of \$95,900.00. The out-of-pocket disbursements of the plaintiff to 6th December 1943, proved at the trial and not seriously questioned by the defence, amount to \$19,191.29.

There should be judgment for the plaintiff for \$115,091.29. The costs of the trial before Mr. Justice Chevrier, in the Court of Appeal and on the appeal to the Supreme Court of Canada, have been dealt with in the judgment of the Supreme Court. The plaintiff is entitled to the costs of the new trial.

Judgment for \$115,091.29 and costs.

Solicitors for the plaintiff: Phelan, Richardson, O'Brien & Phelan, Toronto.

Solicitors for the defendants: Smily, Shaver, Adams, De-Roche & Fraser, Toronto.

[COURT OF APPEAL.]

Siopiolosz v. Taylor.

*Defamation—Slander of Title—Essentials of Cause of Action—Malice
—No Presumption in Plaintiff's Favour—Plaintiff's Ownership of
Goods—Proper Direction to Jury.*

In an action for slander of title, it is essential to prove that the words were uttered maliciously, *i.e.*, with an intention to injure the plaintiff, and malice cannot be inferred merely from the fact that the words were calculated to injure the plaintiff. *Shapiro v. La Morta et al.* (1923), 40 T.L.R. 39, 201; *Dunlop Pneumatic Tire Company (Limited) v. Maison Talbot et al.* (1904), 20 T.L.R. 579, considered. An intention on the part of the defendant to assert his own right, real or supposed, to the property, will negative the idea of malice, and the plaintiff must prove, as part of his case, that the defendant, when he spoke the words, intended to injure the plaintiff, and did not act *bona fide*. It is for the jury to say, in all the circumstances, what words have been spoken by the defendant, and what was his motive. It is also essential, in such an action, that the plaintiff shall prove ownership of the goods as to which the words have been spoken. This is a question of fact, which must be left to the jury with a proper direction.

An appeal by the defendant from the judgment of Greene J., pronounced after a trial with a jury, in an action for slander of title. The facts are fully stated in the reasons for judgment.

25th January 1944. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and KELLOCK JJ.A.

G. A. Gale, for the defendant, appellant: The necessary ingredients of malice, which is essential to support the plaintiff's

action, were not properly explained to the jury. The action will not lie if the defendant spoke the words in a *bona fide* (even if mistaken) attempt to assert, protect or defend her own title or claim to the property: *Gatley on Libel and Slander*, 3rd ed., p. 158. The plaintiff must prove that the statement was made with the intention of injuring her, rather than for the purpose of protecting the defendant's own claim. It must be established that the statement was false to the knowledge of the defendant, and that it was made maliciously, to do harm to the plaintiff: *Halsey v. Brotherhood* (1881), 19 Ch. D. 386. The defendant in this case may have acted stupidly, and yet, if she truly believed in the existence of her right, no action lies: *Steward v. Young* (1870), L.R. 5 C.P. 122; *Clark v. Molyneux* (1877), 3 Q.B.D. 237. She made the announcement honestly, to protect her claim to the goods which were being offered for sale, since she considered that they were subject to a valid and subsisting seizure by her bailiff. The trial judge should have told the jury that the use of the word "chattel" (if that was the word used) instead of "seizure" would make no difference in the effect of the announcement.

Before a plaintiff can succeed in an action for slander of title, ownership of the property must be established, and this question is one of fact, to be left to the jury: *Gatley, op. cit.*, p. 157; *Germ v. Pasteur* (1894), 81 Hun. (N.Y.) 49. In the case at bar, the plaintiff sued as the owner of these goods, her claim to ownership being based upon an alleged sale to her by her son. Had the issue of ownership been properly left to the jury, they might have decided that the purported sale was only a means of defeating the defendant's claims for arrears of rent and under her judgment. There was an issue to present to the jury on the question of ownership, but the case was left to them as if ownership had already been established.

The trial judge suggested in the first instance that no matter what their findings might be in other matters, the jury should assess the plaintiff's damages. Although this suggestion was later withdrawn, the jury may have received the impression that the question whether or not the plaintiff suffered any damage was settled in her favour. Actual damage must be established in an action of this kind. In any event, the amount awarded was excessive. The plaintiff should have mitigated her damages. If she feared that the buying public had been intimidated, the

sane course of conduct would have been for her to cancel the sale. This question also is one of fact, and should have been left to the jury.

P. J. Bolsby, for the plaintiff, respondent: The words as alleged were proved to have been spoken by the defendant, and to have been false to her knowledge. She did not have a chattel mortgage against the goods; she had no claim whatever against the plaintiff. [ROBERTSON C.J.O.: The whole question here is whether the trial judge was right in telling the jury that the plaintiff had substantiated her claim to the right to sue. If there was evidence of ownership, it was for the jury to believe or disbelieve it.] The plaintiff alleged and proved ownership of the goods. She, as owner, advertised them for sale. The trial judge carefully and properly instructed the jury on the question of ownership. The plaintiff was in possession of the goods, and of the farm on which they were situated. [ROBERTSON C.J.O.: The appellant's objection is that the trial judge took the question of ownership completely away from the jury.] The evidence was more than sufficient to establish ownership in the plaintiff, and the judge did not take the matter away from the jury. [ROBERTSON C.J.O.: It is a mixed question of law and fact.] Surely, as a matter of law, it is admitted that the plaintiff had a saleable interest in the goods, and as between the parties to the action, she was the owner: Odgers, Libel and Slander, 6th ed., p. 70; *Dunlop Pneumatic Tyre Company (Limited) v. Maison Talbot et al.* (1904), 20 T.L.R. 579 at 590; *Vaughan v. Ellis* (1609), 1 Cro. Jac. 213, 79 E.R. 185. The plaintiff need not establish absolute ownership, provided she has an interest in the sale: *The Manitoba Free Press Company v. Nagy* (1907), 39 S.C.R. 340.

Clark v. Molyneux (1877), 3 Q.B.D. 237, is not authority for the proposition that a plaintiff must prove more than that the statement was false to the knowledge of the defendant. That action was for libel, and the malice there required is of a different kind. The case is complete authority for the proposition that publication of a statement known to be false is conclusive proof of malice. The trial judge clearly and correctly instructed the jury as to the nature of this action, its essential elements, and the matters which were within their province. Malice, or the intent to injure, is established on proof that the defendant published false words, knowing them to be false: Odgers, *op. cit.*, p. 72; Gatley, *op. cit.*, p. 159; 20 Halsbury, 2nd ed., p. 538.

The damages assessed by the jury were more than supported by the evidence. There should be no interference with their findings, which were reasonable: *McCannell v. McLean*, [1937] S.C.R. 341 at 343, [1937] 2 D.L.R. 639.

G. A. Gale, in reply.

Cur. adv. vult.

25th February 1944. The judgment of the Court was delivered by

KELLOCK J.A.:—This is an appeal by the defendant from the judgment of Greene J., pronounced 17th September 1943, after a trial with a jury. The action was brought against the appellant for damages for slander of title. The verdict of the jury was a general verdict in favour of the respondent for \$1,000 damages.

The evidence discloses that by lease dated 27th December 1932, the mother of the appellant demised a farm to one Gus Siopiolsz, husband of the respondent, and two sons, Joseph and Jerome. Immediately prior to entering into this lease Gus Siopiolsz, who had been in possession of another farm known as the Watson farm, had executed a chattel mortgage to a bank covering certain farm chattels then on the Watson farm. In connection with this mortgage the mortgagor made a statutory declaration that he was the exclusive owner and possessor of the chattels, and the appellant stated that Gus Siopiolsz had told her mother, when negotiating for the lease, that he was the owner.

In February 1933 there came to the appellant's notice an advertisement of a sale for taxes of the chattels of Gus Siopiolsz, to be held on the Taylor farm. The following day the appellant met the respondent, her husband, and Joseph Siopiolsz, as a result of which the appellant agreed to lend to the husband an amount sufficient to pay the taxes in arrear, for which loan she took from Gus Siopiolsz his promissory note. This was all done in the presence of the respondent and Joseph Siopiolsz, neither of whom suggested that anyone but the husband had any interest in the chattels, although at the trial of this action the son gave evidence that the chattels had always been his property. Before the appellant agreed to make the loan she had seen the chattel mortgage above referred to in the bank. It should be added that the note was indorsed by both the respondent's sons.

The appellant says that in March of 1937 the note was still outstanding, although interest had been paid, and that there was rent in arrear with respect to the Taylor farm to the extent of \$537.50. She thereupon had the necessary papers prepared by a solicitor, and instructed a bailiff, one Kemp, to make a distress for rent. This bailiff was overseas at the time of the trial, but Joseph Siopiolosz admitted in evidence that a seizure had been made. Appellant produced at the trial a document (Ex. 18) which she said was a copy made from a document shown to her by Kemp when reporting to her. This document is headed "List of items seized by F. W. Kemp Mar. 30, 1937." Then follows a list of chattels, some of which, at any rate, are the same as in the chattel mortgage of 1932. The document also contains the following: "I agree not to sell any of the said goods and chattels or any part thereof and hereby agree to pay any expenses which may be incurred by keeping possession of said goods and not to replevy the same or remove same or dispose of same or any part thereof and which I promise and agree to return to said Bailiff whenever demanded at. (Signed) Gus Siopiolosz." While this signature is included in what the appellant says she "copied", she admits she "was not actually close enough to particularly read the signature."

Some time in the winter or spring of 1938 the Siopiolosz family removed from the Taylor farm. Ultimately, in November 1940, appellant brought action upon the promissory note and obtained a judgment against Gus Siopiolosz and the two sons. Some small amounts were paid on the note by the son Joseph, but in September 1941 a seizure was made of certain chattels on the farm upon which respondent and her husband were then living, the seizure being made under the judgment. At this time Gus Siopiolosz was the tenant of this farm, but the respondent claimed the chattels seized, basing her claim on an alleged purchase by her from her son Joseph. It is not pretended that there was any bill of sale executed, and there would seem to be considerable question as to whether there was any change of possession. On an interpleader issue it was held that the appellant had not established that the chattels seized were the property of the judgment debtor, and the seizure was therefore set aside. The evidence of the respondent that she owned the goods seized was accepted.

It is not clear on the evidence whether the chattels seized were included in Ex. 18. In any event they would form a small part numerically of the chattels mentioned in that exhibit.

On the day following the trial of the interpleader proceedings, and while judgment was still reserved, Gus Siopiolosz surrendered the lease of the farm he was then occupying, and a new lease was granted to the respondent.

After judgment had been delivered, and some time in the year 1942, the appellant made a further seizure under execution, of hay and grain on the Siopiolosz farm. The respondent again made claim, and interpleader proceedings were again taken, but judgment had not been delivered at the time when the alleged cause of action which is the subject of the present proceedings arose.

Some time prior to 4th November 1943, the respondent advertised a sale by auction of farm chattels to be held on that day. This advertisement came to the notice of the appellant before the sale. These chattels included chattels which had been on the Taylor farm. She says that she had been advised by different solicitors that the Kemp seizure was still valid, and that their removal from her farm was illegal. Her mother had died in October 1939, leaving her her sole beneficiary, and she says that in order to protect her interest in the chattels she determined to attend the sale. According to her evidence she prepared an announcement which she proposed to make referring to the seizure for rent and the seizure under execution as to which judgment was still pending in the interpleader proceedings. She did not read the announcement but says that she said the same thing, and in this she is supported by another witness. What she says she said was: "I have an announcement to make. A seizure was made on the Taylor farm before the chattels were moved to this one, that seizure has not yet been paid, a further seizure has been made on this property, the matter is now in the hands of the judge, he has not yet given his decision." However, a number of witnesses called on behalf of the respondent swore that what the appellant said was: "I have an announcement to make. I have a chattel on all these goods and anyone purchasing them does so at their own risk and will be made to return them to me or pay me over again." The action was accordingly brought, the respondent alleging that as a result of the words spoken by the appellant the sale had been depressed.

I have not referred to all the evidence, but only sufficient in order that the objections made on behalf of the appellant to the charge to the jury may be understood. What the true facts may be, as established by the evidence, is a matter for the jury.

The grounds of complaint on the part of the appellant as to the learned judge's charge are in the main two. It is argued that the learned judge erred in his charge to the jury with respect to the law as to malice in an action of this kind. It is also urged that with respect to the question as to the ownership of the goods the matter was not left to the jury as a matter of fact to be determined by them on the evidence, but that the learned judge had in fact withdrawn the point from the jury. I do not think it necessary to refer to the other matters argued.

With respect to the question of malice, the learned judge, after having charged the jury that the respondent must prove that the statement was made maliciously, *viz.*, with the intention of injuring the plaintiff, also said:—

"If you find that the words were spoken substantially as the plaintiff alleges, then you have to go on and decide as to whether they were spoken maliciously. That does not mean malice in the ordinary sense. You have seen people of nasty and ugly disposition who have gone out of their way to hurt somebody or to hurt an animal or to do something nasty or malicious without any cause; I think that is what we all take to be the ordinary meaning of malice; but the meaning to be given to it here is that, as a matter of law, if the words were spoken and were false, then to be spoken maliciously they must have been spoken with the intention of injuring the plaintiff, Agnes Siopiolosz. Again quoting from one of the text-book writers, whose words are better than mine, 'The malice essential to support the action is an intention to injure the plaintiff. Such an intention will be inferred on proof that the words were calculated to produce actual damage and that the defendant knew they were false when he published them or was recklessly indifferent as to whether they were false or not.' Such an intention—that is, an intention to injure the plaintiff—will be inferred on proof that the words were calculated to produce actual damage.

"You gentlemen have heard the whole discussion of the auction sale, and, remember, my discussion is all based on the assumption—it is for you gentlemen to say: if you find that Miss Taylor did not use these words substantially as alleged by the

plaintiff, then you have nothing further to think about, but if you do find that she used words substantially as alleged by the plaintiff, then an intention will be inferred on proof that the words were calculated to produce actual damage. You have heard the description of the sale from many witnesses, and it is for you to say, if you think those words were spoken, as to whether they were calculated—and I think the word 'calculated' means 'likely'—to produce actual damage, and that they were intended to produce damage."

In *Halsey v. Brotherhood* (1881), 19 Ch. D. 386, Lord Cole-ridge L.C.J., in dealing with an action of this character, says at p. 388:

"It seems to be clear law that in an action in the High Court in the nature of slander of title, where the defendant has property of his own in defence of which the supposed slander of the plaintiff's title is uttered, it is not enough that the statement should be untrue, but there must be some evidence, either from the nature of the statement itself or otherwise, to satisfy the Court or the jury that the statement was not only untrue, but was made *mala fide* for the purpose of injuring the plaintiff and not in the *bona fide* defence of the defendant's own property. It seems to be clear that if a statement is made in defence of the defendant's own property, although it injures and is untrue, it is still what the law calls a privileged statement; it is a statement that the defendant has a right to make, unless, besides its untruth and besides its injury, express malice is proved, that is to say, want of *bona fides* or the presence of *mala fides*."

In that case the defendant, the holder of a patent, had issued a warning against the purchase of certain articles, alleging that they were infringements and threatening legal proceedings against those who did purchase. At p. 389 the Lord Chief Justice says, in speaking of the notices which the defendant had given:

"The result of that may be injury to the Plaintiff. Possibly in this case it has been injury to the Plaintiff. I am quite content to assume that it has, but it appears to me that a statement made under such circumstances does not give a ground of action merely because it is untrue and injurious to the Plaintiff, there must be also the element of *mala fides* and a distinct intention to injure the Plaintiff apart from the honest defence of the Defendant's own property."

In *Wren et al. v. Weild* (1869), L.R. 4 Q.B. 730, the plaintiffs were manufacturers of certain machines and they complained of certain statements made by the defendant to prospective customers of the plaintiffs that the machines were infringements of a patent held by the defendant. In giving the judgment of the Court, Blackburn J., as he then was, says, at p. 734:

"The most favourable view for the plaintiffs is to consider whether,—if this evidence had been received, and had proved all that it could prove, namely, that the patent of the defendant was void, and that, even if it was good, an action brought on it against those who used the plaintiffs' machine must have failed, and that the defendant, when he wrote the letters, knew the facts which would have produced this effect,—there would have been evidence which the judge ought to have left to the jury in support of the issue in the present action. And we think that there would not have been such evidence. . . ."

On the same page he says:

"But it is obvious that, where a person claims a right in himself which he intends to enforce against a purchaser, he is entitled, and, indeed, in common fairness, bound, to give the intended purchaser warning of such his intention: see *Pitt v. Donovan* (1813), 1 M. & S. 639, 105 E.R. 238; and, consequently, we think no action can lie for giving such preliminary warning, unless either it can be shewn that the threat was made mala fide, only with the intent to injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful."

And at p. 737:

" . . . we think, the action could not lie, unless the plaintiffs affirmatively proved that the defendant's claim was not a bona fide claim in support of a right which, with or without cause, he fancied he had; but a mala fide and malicious attempt to injure the plaintiffs by asserting a claim of right against his own knowledge that it was without any foundation."

The quotation from the text-book read to the jury by the learned trial judge is apparently from *Gatley on Libel and Slander*, 3rd ed., pp. 152-3. The author, however, has not there particular reference to an action of slander of title, but generally to an action on the case for damage wilfully and intentionally done without just occasion or excuse by the use of words not actionable *per se* or even defamatory. In such an action on the

case, however, there may be no question at all of any claim on the part of the defendant to property which he desires to protect. The case of *Shapiro v. La Morta et al.* (1923), 40 T.L.R. 39 and 201, to which the text-writer refers in support of the passage quoted by the learned trial judge, was not a case of slander of title, but in dealing with cases of the latter character Lush J., in the course of his judgment, at p. 40, says:

"If, however, false statements are published which disparage the property, or title to property, of another, or disparage his business or the goods which he manufactures, without being defamatory of the owner personally, and an action is brought, three things have to be proved by the plaintiff—(1) that the statements are untrue, (2) that they caused him actual damage, and (3) that the publishers of the statements acted maliciously. There is no presumption of malice in these cases. . . ."

In the same case, at p. 203, Scrutton L.J. said:

"Actions for slander of title and similar falsehoods, affecting not reputation but property or business, differ from statements defamatory of reputation in that (1) only actual damage resulting from the untruths can be recovered and the plaintiff must prove it, and (2) the plaintiff must prove 'malice' instead of its being presumed."

In *Dunlop Pneumatic Tire Company (Limited) v. Maison Talbot et al.* (1904), 20 T.L.R. 579, Collins M.R. says, at p. 581:

"To make the act malicious it must be done with the direct object of injuring that other person's business. Therefore, the mere fact that it would injure another person's business was no evidence of malice."

I therefore think that the judge erred in charging the jury that malice in an action of this character will be inferred on proof that the words spoken were calculated to produce actual damage, and that this was a substantial wrong. The language of Lush J. in *Shapiro's* case, 40 T.L.R. at 40, referred to in Gatley, *op. cit.*, p. 153, is not to be applied to an action such as this where an intention on the part of the defendant to assert his own right, real or supposed, to the property negatives the existence of malice and where the plaintiff must prove, as part of his case, that the defendant's intention, when he spoke the words complained of, was to injure the plaintiff. It is for the plaintiff to prove the existence of *mala fides*. Nothing is presumed in his favour. The argument for the respondent, both

orally and in the memorandum filed since the argument, fails to recognize the place and importance of these principles.

On behalf of the respondent it is argued that if the appellant used the word "chattel" in the sense of meaning that she had a chattel mortgage, such a statement would be clear evidence of malice, as she knew she had no such mortgage. In my opinion, it was for the jury to say, in all the circumstances, what words were spoken by the appellant and what was her motive in using such words, *i.e.*, whether it was to protect herself rather than to harm the respondent. As put by Lindley L.J. in the *Halsey* case, at p. 392: ". . . if I know that what I say is untrue, it would not take much to persuade a jury that I was acting dishonestly, and then an action for damages would lie." But it remains a matter of fact for the jury. See also the judgment of McCardie J. in *British Railway Traffic and Electric Company, Limited v. The C.R.C. Company, Limited et al.*, [1922] 2 K.B. 260 at 271. To employ the words of that learned judge in that case at p. 269, "Malice in its proper and accurate sense is a question of motive, intention or state of mind." Similarly, to use the words of Maule J. in *Pater v. Barker* (1847), 3 C.B. 831 at 868, 136 E.R. 333, "The jury may infer malice from the absence of probable cause; but they are not bound to do so. The want of probable cause does not necessarily lead to an inference of malice; neither does the existence of probable cause afford any answer to the action." See also *Atkins v. Perrin* (1862), 3 F. & F. 179, 176 E.R. 81.

In my opinion, the jury, if properly instructed, might well have concluded that, although the appellant did use the word "chattel", even although maintaining that she used the word "seizure", she did so as the result of a slip or mistake, or for some other reason not dishonest. It was equally open to the jury to find the other way. Nothing is to be presumed, however, as a matter of law.

Dealing with the appellant's second objection, the learned judge in the course of his charge on the question of respondent's ownership of the goods, told the jury that she must make some proof of ownership, and pointed out that she was ostensibly in possession of them. He also referred to the evidence of her husband and her son Joseph to the effect that the respondent was the owner. He then told the jury that ownership of goods might pass by verbal gift and that while there was considerable

evidence as to who owned the goods originally, ownership in the goods could have passed to the respondent shortly before the sale. He pointed out that the respondent had held herself out as owner with the consent of her husband and son, and that they would be estopped from denying her title. The learned judge then referred to the seizures which resulted in interpleader proceedings and to the result of the first, and concluded as follows: "so that she has pretty well established a sufficient position under those circumstances to institute an action of this kind as owner." And a little further on he said: "on the face of the circumstances I suggest to you that she has established a sufficient position as owner to institute the action; but, I am very careful to point out, that is not any comment on the merits of the action; that is just the question as to whether she had a right to commence the action or not because of her position."

To my mind this does not leave to the jury the question as to whether or not, on all the evidence, the husband was, as a matter of fact, the owner of the goods, but on the contrary amounts to a direction that the respondent was in law entitled to maintain the action as owner. The question of the respondent's ownership was put directly in issue in the pleadings, and the onus was upon her to satisfy the jury as a matter of fact that she was the owner. The evidence of the appellant, her husband and her son was relevant on the issue, but it was open to the jury to disbelieve that evidence and to find that the assertion of title by the respondent, and whatever had been done to give the appearance of ownership in her, had all been done to impede the appellant in collecting her debts, if the jury were satisfied on the evidence that such debts were in fact owing. I therefore think this objection on the part of the appellant is also well taken.

In the result, therefore, I would allow the appeal and direct a new trial. The appellant should have the costs of the appeal, and the costs of the former trial should be in the discretion of the judge presiding at the new trial hereby directed.

New trial ordered.

Solicitors for the plaintiff, respondent: Bray, Bray and Lochead, Kitchener.

Solicitors for the defendant, appellant: McPherson, Thompson & Anderson, Stratford.

[COURT OF APPEAL.]

Mathews v. Coca-Cola Company of Canada Limited.

Negligence—Liability of Manufacturer to Ultimate Consumer—Test of Liability—Whether Goods Intended to Reach Consumer in Same Form—Reasonable Possibility of Intermediate Inspection.

Where the ultimate consumer of manufactured goods sues the manufacturer for damages resulting from negligence in the process of manufacture, the moot question (assuming that negligence is satisfactorily established) is whether the goods were sold by the manufacturer "in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination". *McAlister (or Donoghue) v. Stevenson*, [1932] A.C. 562 at 599; *Grant v. Australian Knitting Mills, Limited et al.*, [1936] A.C. 85, applied. A "reasonable possibility of intermediate examination" denotes that an examination reasonably might be made before the product was ultimately used, not merely that such an examination was capable of being made.

The plaintiff discovered a dead mouse in a beverage which she had partly consumed, and became ill in consequence. Held, HENDERSON J.A. dissenting, the preponderance of evidence indicated that the mouse must have got into the bottle before it left the manufacturer, and that its remaining there was the result of negligence on the part of the manufacturer's employees. It was also clear that the manufacturer intended the beverage to reach the ultimate consumer in the form in which it was sold, and, although an examination might have been made by the plaintiff, and, if made, would possibly have revealed the mouse, such an examination was not reasonably to be anticipated, and the manufacturer was therefore liable.

AN appeal by the plaintiff from the judgment of Schwenger Co. Ct. J., of the County Court of the County of Wentworth, dismissing the action. The facts are fully stated in the reasons for judgment.

12th and 13th January 1944. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and GILLANDERS JJ.A.

A. M. Lewis, K.C., for the plaintiff, appellant: The evidence in this case brings it directly within the principle of *McAlister (or Donoghue) v. Stevenson*, [1932] A.C. 562. It would impose an intolerable burden on a person to hold that there was an obligation to examine the bottle before drinking from it. The trial judge erred in holding that there was in the circumstances any duty upon the appellant to make an inspection by going to a lighter place in the restaurant, and for this reason the case is distinguishable from *Saddlemire v. Coca-Cola Company of Canada*, [1941] O.W.N. 392, [1941] 4 D.L.R. 614. The onus is upon the respondent to explain the presence of the mouse in the bottle. The principle *res ipsa loquitur* is applicable here. The mouse was found in the liquid, and it is for the respondent to explain its presence. The care required in these cases neces-

sarily approximates to and almost becomes an absolute liability: *Shandloff v. City Dairy Ltd. and Moscoe*, [1936] O.R. 579, at 590, [1936] 4 D.L.R. 712.

It has not been proved that the mouse got into the bottle of Coca-Cola without negligence on the part of the respondent.

C. W. R. Bowlby, K.C., for the defendant, respondent: In the case at bar we are dealing with people widely separated, the manufacturer and the consumer. Surely the manufacturer is entitled to some degree of protection. [ROBERTSON C.J.O.: Its servants may have been negligent in their various duties. The system employed by the respondent contemplates the exercise of a high degree of care, which may not in fact have been exercised.] In the manufacture of its product the respondent used all reasonable care to ensure that the completed product would be free from any defect. The principle *res ipsa loquitur* does not apply. The dead mouse must have been placed in the bottle by some person other than the servants or agents of the respondent, and further it must have been in plain view of the appellant, who had the opportunity to inspect the bottle carefully.

I rely on *Farr v. Butters Brothers and Company*, [1932] 2 K.B. 606; *Otto v. Bolton and Norris*, [1936] 2 K.B. 46 at 55 and 57; *Grant v. Australian Knitting Mills, Limited et al.*, [1936] A.C. 85; 23 Halsbury, 2nd ed., p. 632; *Shandloff v. City Dairy Ltd. and Moscoe*, [1936] O.R. 579 at 590, [1936] 4 D.L.R. 712; *Arendale et al. v. Canada Bread Company Ltd.*, [1941] O.W.N. 69, [1941] 2 D.L.R. 41; *Johnson v. Summers*, 47 Man. R. 449, [1939] 2 D.L.R. 665, [1939] 1 W.W.R. 362.

It follows from the *Grant* and *Donoghue* cases, *supra*, that no duty arises towards the ultimate consumer unless the manufacturer puts the product out in such a fashion that it cannot be examined. There are certain cases dealing with the examination of machinery: *Dransfield v. British Insulated Cables, Limited* (1937), 54 T.L.R. 11; *Paine v. Colne Valley Electricity Supply Co., Ltd., and British Insulated Cables, Ltd.*, [1938] 4 All E.R. 803. [HENDERSON J.A.: Surely the probability of examination rests on opportunity.] [GILLANDERS J.A.: The examination contemplated by all the cases seems to be a visual one.] [ROBERTSON C.J.O.: Essentially in this kind of case it must be proved that the goods came from the manufacturer's hands in a proper condition.]

A recent decision dealing with the consumer's opportunity to examine a product is that in *Haseldine v. C. A. Daw & Son, Ltd. et al.*, [1941] 3 All E.R. 156. However, the subject matter is machinery, and I have been unable to find in the English reports a decision relating to examination of food and drink since *McAlister (or Donoghue) v. Stevenson*, [1932] A.C. 562. This Court should be bound by that case and by *Grant v. Australian Knitting Mills, Ltd., supra*, as interpreted in *Shandloff v. City Dairy, supra*. [ROBERTSON C.J.O.: The point we are now dealing with did not arise in the *City Dairy* case.] Where a soft drink is sold in such a manner that the consumer has every opportunity to examine it, there is no liability of the manufacturer to the consumer. What more can a manufacturer do than take every reasonable care? [ROBERTSON C.J.O.: If the mouse was present in the bottle, then every care was not taken; some one was negligent, and the defect was there when the product left the hands of the manufacturer.] Until the *Donoghue* case, there never was a duty to the ultimate consumer, and following that decision a duty only arises if there is no opportunity of examination. The trial judge not having found negligence on the part of the respondent, this Court should not find negligence. In the *Shandloff* case, the Court of Appeal was dealing with a case in which the trial judge had found negligence. The evidence here does not establish negligence which might render the respondent liable: *Bloom v. Creed and The Consumers' Gas Co. of Toronto*, [1937] O.R. 626, [1937] 3 D.L.R. 709. If a manufacturer, who uses reasonable and proper care, puts his product in a clear bottle and then can be held responsible in such a case as this, he will be the victim of unscrupulous people. Once the bottle has passed out of the possession of the manufacturer, the plaintiff should be put to the strictest proof.

A. M. Lewis, K.C., in reply: It is easier to conclude that the mouse inadvertently entered the bottle before leaving the manufacturer's plant than to find that it was placed there afterwards by malicious design. The trial judge found no default or carelessness in the appellant, and therefore the presumption of negligence still persists against the respondent. The presumption of negligence persists until there is some contributory negligence in the appellant, and there has been no such finding to assist the respondent. Further, we should not lose the value of that

presumption unless it is proved that we are guilty of contributory negligence, or that we voluntarily undertook the risk.

Cur. adv. vult.

29th February 1944. ROBERTSON C.J.O.:—This is an appeal by the plaintiff in the action from the judgment of Judge Schwenger, dated 30th July 1943, in an action tried before him at Hamilton, without a jury. The plaintiff's action was dismissed with costs.

On 12th January 1942 appellant went to a restaurant in Hamilton, and was served with a bottle of Coca-Cola. On proceeding to drink it she noticed an unpleasant taste. She called the attention of the waitress to it, and on examination a dead mouse was found in the bottle. The appellant had some illness as the result, and the learned County Judge assessed her damages at \$350 in case it should be found on appeal that she was entitled to damages.

It lies at the threshold of the appellant's case that she must establish that the contents of the bottle of Coca-Cola, with which the waitress in the restaurant served her, were the contents of the bottle when it left respondent's hands. Unless this is established respondent is clearly under no liability whatsoever. There was no identifying mark on the bottle itself to distinguish it from any other Coca-Cola bottle, so that it can be traced from hand to hand with certainty. It is necessary to consider the facts and circumstances disclosed in evidence to determine what the appellant has proved.

There is no substantial ground for doubting that in the bottle of Coca-Cola brought by the waitress to the appellant there was a dead mouse, and that was no doubt the condition of things when the waitress opened the bottle to take it over to the appellant. The bottle was taken by the waitress from the cooler in the restaurant, where it had been put by the proprietor, who had brought it up from the cellar. The proprietor, Jurowski, obtained his supplies of Coca-Cola directly from the respondent. This would seem to make a good *prima facie* case for the appellant, but the learned trial judge did not make a finding in her favour upon this issue. It appeared conclusive to the learned trial judge that the mouse must have been in the bottle before it went to the washing machine in respondent's premises, or to have been placed there surreptitiously after its processing had

been completed. He said that if he were called on to determine this point, he would be compelled to the latter conclusion, in view of the uncontradicted technical evidence of two expert witnesses called by the respondent, Mitchell and Webb, and the fact that there is in the case no direct evidence of negligence by the respondent, but only an inference of negligence, to be drawn from the finding of the mouse in the bottle. He thought this inference much weakened by the evidence that the bottle in question may have been in the retailer's stock-room for as long as one week before the appellant was supplied with it, and that others may have had access thereto in that interval.

I do not suppose that anyone would seriously contend that the mouse—alive or dead—got into the bottle during the process of cleansing and filling. This process is carried on with machines, and is a continuous one, the bottles being brought to the machines in regular rotation on conveyors running upon rollers as an endless chain. There are attendants at the various stages of the process to see that things are going as they should. It seems an unlikely time for a mouse to get in. The experts who saw the process in operation say it is impossible. The empty bottles, however, after use, are gathered up by respondent from its customers, who are allowed a rebate on their return. It is unlikely that any special care is taken of the bottles once they are empty and are awaiting the gathering up and the process of washing and re-filling. Mice, in their ceaseless search for food, are apt to be about the premises of restaurants and grocery shops, and the other places where such drinks as Coca-Cola are commonly sold, and it is admitted by respondent's foreman that he has seen mice in respondent's premises. It is a likely enough thing that a mouse searching for food should get inside an empty bottle, and perhaps have difficulty in getting out again. It would seem more likely that a mouse would get into an empty bottle at this time rather than at any later time. Whether such a mouse might still remain in the bottle after respondent's process of cleansing and re-filling depends on whether the process is so thoroughly efficient as to exclude that possibility.

The experts to whose evidence the learned judge refers are, one of them a consulting engineer, and the other a travelling salesman and service-man for a manufacturer of bottle-caps and bottling machinery. These witnesses give a detailed description of the process followed in washing the empty bottles and in

re-filling them and crowning them ready for sale. They also made tests or experiments by putting foreign substances in bottles at one stage and another. It might have been useful if they had tried a dead mouse, but they did not. These experts highly commend respondent's process, and one of them expresses the opinion that no foreign substance of a substantial size could get through that system and come out in a full bottle of Coca-Cola. In forming this opinion, however, the complete efficiency of respondent's employees, whose duty it is to look out for indications of the presence of foreign substances, is assumed. That there is not always that complete efficiency plainly appears by the evidence of another of respondent's witnesses.

There are a number of employees stationed along the line of the conveyor system on which the bottles are carried through the cleansing and filling process. Six of these employees have a duty to watch for defective bottles, bottles that contain foreign substances, and such matters. Five of the six have other functions to perform in the process, but one of them, called the inspector, has only that duty to perform. He is stationed at the point where the cleansing process has finished and the filling process is to begin. There are special lights provided to aid him, and he and another operator alternate as inspectors, in periods of twenty minutes each, because of the strain on the eyes. No doubt, the system is a good one, and that it serves a useful purpose is certain, for the inspectors, as well as others who have a duty to watch, do detect bottles they require to reject. It is highly significant, however, that the attendants further along the line than the inspector find such bottles. Through some failure on the part of the attendants who have allowed them to pass their inspection, other "rejects" are taken out of the line, even by the last of the six attendants watching for them. Each of the six is supplied with a box in which to place his "rejects", and another employee is assigned the duty of removing these boxes when full, and putting empty boxes in their place. This also is part of the regular routine, and it is, therefore, well within the knowledge of respondent that, mechanically, its process is not completely efficient in cleansing the bottles of all foreign substances, and that the employees make mistakes. There is nothing in evidence to support the view that the last man, of the six watching attendants, is infallible, when none of the other five is.

Such evidence as respondent offered of the day-to-day operation of its plant was given by a foreman, Oliver. He had formerly worked on the line as an inspector, and in fact he was one of those employed in that capacity in December 1941 and January 1942. He made the definite admission in the witness-box that after each of the six inspections there were, at times, rejections. No doubt there were rejections at times for other causes than the presence in the bottle of some foreign substance, but it is a striking omission from respondent's case that this witness was not asked definitely whether a bottle containing a mouse had ever been detected in the course of the process, and if so, how early in the process it was detected. Respondent could have known the answer in advance and whether it was safe to ask the question. It would have added immensely to the weight of the experts' opinion, if it had been fully supported by the evidence of operators. As it stands, the evidence of Oliver, the only operator called, falls definitely short of that.

With respect to the alternative suggestion that the mouse was placed in the bottle surreptitiously after its processing had been completed, there is not a great deal to be said, for there is no evidence of any facts that support it. There is no evidence that any person had any motive for doing such a thing, or an opportunity and the facilities for doing it. There is evidence of the keeper of the restaurant, that there were no loose tops on the bottles he put in the cooler. The waitress swears that the contents of the bottle "fizzed" normally when she opened it. While the evidence may fall short of proving that such an occurrence as is suggested was impossible, there is an utter absence of evidence of its probability. The bottles of Coca-Cola were delivered at the restaurant by respondent in cases, and there is nothing in evidence that indicates that thereafter anyone but the restaurant proprietor and the waitress handled this bottle, or in any way interfered with it. On the contrary, its condition when opened definitely indicates that it came in the same condition from respondent.

There is really no conflict in the evidence as to the essential facts of this case. With respect, I think the learned County Judge has, in company with the two expert witnesses called for the respondent, assumed a constant and efficient watchfulness on the part of respondent's employees that they did not always exercise. The degree to which this lack of care prevails, and

whether it is greater with some employees than with others, or at some periods of the day's work than at others, the respondent has not seen fit to disclose in evidence. None of the employees was called, except the foreman, Oliver. The evidence of the latter establishes that there are weaknesses in respondent's system that the experts have overlooked, and, in the result, the happening of such an event as is complained of here is not only not shown to be impossible, but would appear to be not even improbable on occasion. The only other manner suggested in which the presence of the mouse in the bottle can be explained is by the deliberate act of someone. There is nothing in evidence to suggest who that someone might be, or that it might not as well be an employee of the respondent as someone else. With great respect for the learned County Judge, I am of the opinion that the balance of probabilities on this question is strongly in favour of the appellant, and as there is no question of the credibility of witnesses involved, I am compelled to the conclusion that the finding of fact should be that the bottle in question, when supplied by respondent to the keeper of the restaurant, contained the dead mouse found in it when served to the appellant.

There is the further serious question whether, in this case, there being no privity of contract between the appellant and respondent, an action for negligence lies by the appellant against the respondent. My brother Gillanders has dealt with that question exhaustively in his reasons for judgment, which I have had the privilege of reading. I agree in the conclusion at which he arrived on that matter, and need not enter into an examination of the authorities. The moot question would seem to be whether the manufacturer "sells [his products] in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination", to quote the words of Lord Atkin in *McAlister (or Donoghue) v. Stevenson*, [1932] A.C. 562 at 599, specifically approved by the Judicial Committee in *Grant v. Australian Knitting Mills, Limited et al.*, [1936] A.C. 85 at 102. A "reasonable possibility" denotes an event that reasonably may happen, rather than something that can happen. The sealed bottles of Coca-Cola were delivered by the respondent in cases at the restaurant, the cases being delivered to the "pop-room" in the basement, where they remained until the cooler

upstairs in the restaurant required to be re-filled. I find no evidence that would indicate any reasonable possibility of an intermediate examination of the bottle before being served to a customer, although it is not impossible that a suspicious person making a careful examination in a strong light would have discovered the dead mouse.

The appeal should be allowed and the appellant should recover the sum of \$350, at which the damages were assessed by the County Court Judge. The appellant is entitled to her costs of the action and of the appeal.

HENDERSON J.A. (*dissenting*):—This is an appeal from the judgment of His Honour Judge Schwenger sitting in the County Court of the County of Wentworth, dated 30th July 1943.

The facts which are not in dispute, as found by the learned trial judge, are as follows: that on 12th January 1942 the appellant (plaintiff) entered a restaurant in the city of Hamilton and was served with a bottle of Coca-Cola, a beverage coming within the class known as "soft drinks" manufactured, bottled and supplied by the respondent for sale to and consumption by the public through retail stores and restaurants. The restaurant had been supplied with the bottle by the respondent; the waitress in the restaurant who served the plaintiff obtained the bottle of Coca-Cola from a cooler behind the counter and removed the cap. She noticed nothing unusual and served the appellant with the open bottle. The beverage was not opaque and the bottle was of clear glass without labels or other obstruction to prevent a view of the contents. The beverage itself is deeply coloured, but transparent, and not so densely coloured that under ordinary circumstances and ordinary lighting conditions anyone looking at the bottle would be unable to see any unusual matter which might be in it.

The appellant in her evidence admitted that if she had examined the bottle in question she might have seen the foreign matter that was in it, which is the cause of this action.

Owing to the fact that it was in the middle of the afternoon and a quiet period in the restaurant, the lighting facilities were not all in use and the appellant was served in a subdued light, which was such that an inspection of the bottle could not be had by simply looking at it as it rested on the table. It would have been necessary to procure better light, either by holding the

bottle up against some source of light or by going to a window or door to obtain additional light and visibility.

Upon sipping some of the beverage, the appellant noticed a peculiar taste, but as she had been served with a piece of pie at the same time, which she was eating, she continued to consume the contents of the bottle and was unable to satisfy herself as to whether the foreign taste came from the pie or the beverage. The appellant then tasted the pie alone, and concluding that the bad taste originated in the pie, she took a large sip of Coca-Cola, and then discovered that the source of the bad taste was in the beverage.

During this operation the appellant did not examine the contents of the bottle, but she called the waitress and complained, with the result that the bottle was taken to the door of the restaurant for examination in better light and it was then discovered that there was a dead mouse in the bottle. The appellant complained of sickness as a result.

The appellant alleges in her statement of claim that the respondent is solely responsible for her injuries and illness, in that

"4. (a) The defendant was negligent in manufacturing and distributing for human consumption a bottle of Coca-Cola with the body of a dead mouse in its contents;

"(b) The defendant was negligent in not properly inspecting its products prior to sale;

"(c) The defendant was in breach of its implied covenant as to quality and fitness for human consumption of the said bottle of Coca-Cola.

"5. The plaintiff pleads the provisions of The Sale of Goods Act, R.S.O., Chapter 180, section 15.

"6. The plaintiff relies on the principle of *res ipsa loquitur*."

Appellant relies on *McAlister (or Donoghue) v. Stevenson*, [1932] A.C. 562, which is the decision of the House of Lords upon an appeal against an interlocutor of the Second Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary. The action had not been tried, and, it appears, came to the House of Lords upon a practice somewhat analogous to that provided by Rule 122 of our Consolidated Rules of Practice, by which it was sought to obtain a decision upon the question whether, assuming that the pursuer proved the averments in her pleading, her action would lie. The House

consisted of Lord Atkin, Lord Thankerton and Lord Macmillan, who upon that assumption upheld the right of action, and Lord Buckmaster and Lord Tomlin who dissented. All five of the Law Lords delivered considered judgments of great interest, and, in my opinion, of great importance.

In my endeavour to arrive at the principle there laid down, the following extracts from the opinions appear to me to require consideration.

Lord Buckmaster (dissenting) said in part, at p. 566:

"My Lords, the facts of this case are simple. On August 26, 1928, the appellant drank a bottle of ginger-beer, manufactured by the respondent, which a friend had bought from a retailer and given to her. The bottle contained the decomposed remains of a snail which were not, and could not be, detected until the greater part of the contents of the bottle had been consumed. As a result she alleged, and at this stage her allegations must be accepted as true, that she suffered from shock and severe gastro-enteritis. She accordingly instituted the proceedings against the manufacturer which have given rise to this appeal.

"The foundation of her case is that the respondent, as the manufacturer of an article intended for consumption and contained in a receptacle which prevented inspection, owed a duty to her as consumer of the article to take care that there was no noxious element in the goods, that he neglected such duty and is consequently liable for any damage caused by such neglect. After certain amendments, which are now immaterial, the case came before the Lord Ordinary, who rejected the plea in law of the respondent and allowed a proof. His interlocutor was recalled by the Second Division of the Court of Session, from whose judgment this appeal has been brought.

"Before examining the merits two comments are desirable: (1.) That the appellant's case rests solely on the ground of a tort based not on fraud but on negligence; and (2.) that throughout the appeal the case has been argued on the basis, undisputed by the Second Division and never questioned by counsel for the appellant or by any of your Lordships, that the English and the Scots law on the subject are identical."

Further, at p. 567:

"The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles

cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit."

Lord Atkin, at p. 579, said:

"The law of both countries appears to be that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists, that would be a question of fact which is sufficiently averred and for present purposes must be assumed. We are solely concerned with the question whether, as a matter of law in the circumstances alleged, the defender owed any duty to the pursuer to take care."

Further, at p. 599:

"My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

Lord Thankerton says in part, at p. 601:

"The action is based on negligence, and the only question in this appeal is whether, taking the appellant's averments pro veritate, they disclose a case relevant in law so as to entitle her to have them remitted for proof. The Lord Ordinary allowed a proof, but on a reclaiming note for the respondent the Second Division of the Court of Session recalled the Lord Ordinary's interlocutor and dismissed the action, following their decision in the recent cases of *Mullen v. Barr & Co.* and *M'Gowan & Barr & Co.* 1929 S.C. 461.

"The appellant's case is that the bottle was sealed with a metal cap, and was made of dark opaque glass, which not only excluded access to the contents before consumption, if the contents were to retain their aerated condition, but also excluded the possibility of visual examination of the contents from outside; and that on the side of the bottle there was pasted a label con-

taining the name and address of the respondent, who was the manufacturer."

At p. 602, Lord Thankerton quotes the averments made by the pursuer, upon proof of which, in the result, the majority of the House held that a good cause of action would be established, *viz.*:

"The duties which the appellant accuses the respondent of having neglected may be summarized as follows:

"(a) That the ginger-beer was manufactured by the respondent or his servants to be sold as an article of drink to members of the public (including the appellant), and that accordingly it was his duty to exercise the greatest care in order that snails would not get into the bottles, render the ginger-beer dangerous and harmful, and be sold with the ginger-beer; (b) a duty to provide a system of working his business which would not allow snails to get into the sealed bottles, and in particular would not allow the bottles when washed to stand in places to which snails had access; (c) a duty to provide an efficient system of inspection which would prevent snails from getting into the sealed bottles; and (d) a duty to provide clear bottles so as to facilitate the said system of inspection."

At p. 605 Lord Thankerton says further:

"My conclusion rests upon the facts averred in this case and would apparently also have applied in the cases of *Mullen* and *M'Gowan*, 1929 S.C. 471, in which, however, there had been a proof before answer, and there was also a question whether the pursuers had proved their averments."

This decision of the majority in this case is, I think, a step in our jurisprudence in the law of tort founded on negligence, and the second case upon which the appellant relies affords a measure of the step taken.

This is the case of *Grant v. Australian Knitting Mills, Limited et al.*, [1936] A.C. 85, a decision of the Judicial Committee of the Privy Council approving the *Donoghue* case. The case was tried by Sir George Murray, Chief Justice of South Australia, who maintained the right of action of the plaintiff, based upon his finding that the manufacturer was negligent. His judgment was reversed by the High Court of Australia and was restored by the Judicial Committee on his findings of fact. The following is taken from the headnote:

"The . . . appellant . . . contracted dermatitis of an external origin as the result of wearing a woollen garment which, when purchased from the retailers, was in a defective condition owing to the presence of excess sulphites which, it was found, had been negligently left in it in the process of manufacture. . . . The presence of the deleterious chemical in the garment was a hidden and latent defect, and could not be detected by any examination that could reasonably be made; nothing happened between the making of the garment and its being worn to change its condition; and the garment was made by the manufacturers for the purpose of being worn exactly as it was worn in fact by the appellant. Held, that those facts established a duty to take care as between the manufacturers and the appellant for the breach of which the manufacturers were liable in tort."

Lord Wright, who delivered the judgment of their Lordships, adopts the language of Lord Atkin in the *Donoghue* case at p. 599, which I have quoted above, and says: "This statement is in accord with the opinions expressed by Lord Thankerton and Lord Macmillan, who in principle agreed with Lord Atkin."

In my opinion the appellant does not bring herself within the principle of the foregoing cases. The learned trial judge has found that the cause of her illness was not hidden; that the bottle of Coca-Cola was of clear glass; that its contents were not opaque and were easily discernible and were in fact discerned immediately upon an inspection being made. The element, therefore, of hidden defect is absent and an ordinary inspection would and did reveal the presence of the deleterious matter.

But in my opinion there is another respect in which the appellant fails.

It is clear from the cases which I have examined and is in my view the law that the onus of proving the negligence of the respondent rests upon the appellant, and the appellant has not discharged the onus. Indeed, in my view of the case, the appellant failed to give any evidence of negligence on the part of the manufacturer. On the contrary, in my view, the respondent established beyond question that it had used meticulous care in its manufacturing operations. The process of cleansing, filling and capping the manufacturer's product is fully described in the evidence offered by the respondent. This process is carried on by machinery and is a continuous one, the bottles being brought

to the machines in regular rotation on conveyors running upon rollers as an endless chain. Employees are stationed at each side of the process charged with the duty of seeing that everything is in order. The machinery employed for washing, cleansing and inspecting the bottles is as nearly fool-proof as it could be made. The process of filling and capping is described in detail in the evidence, and it appears to me that the manufacturer has taken the greatest care to prevent any deleterious matter finding its way into the product. There are six inspections by six different employees during the process, which, in itself, is as nearly mechanical as it can be made. Every bottle passes between the eyes of an employee and a battery of powerful electric lights, and this job is so exacting that he is relieved every twenty minutes. This seems to me to disprove conclusively any charge of lack of care on the part of the manufacturer.

But apart from all this, the learned trial judge, after stating the facts as I have in part cited them, makes his findings upon those facts. He has found that the appellant has not established any negligence whatever on the part of the respondent. From his reasons I quote the following:

"There is no doubt, on the evidence, that there was a mouse in the bottle in question. A great deal of evidence was given by the defence as to how it could have gotten there. This evidence was subjected to vigorous cross-examination but was not rebutted by any contradictory evidence. I am satisfied that no mouse could get into a bottle during the period it was being processed by being received at the washing machine and thence proceeding by various steps through the stages until it became a capped bottle of Coca-Cola, ready for sale to the public. It appears to me as conclusive that it must have been in the bottle before it went to the washing machine or to have been placed there surreptitiously after its processing had been completed. If I were called on to determine this point, I feel I would be compelled to the latter conclusion in view of the uncontradicted technical evidence of the expert witnesses Mitchell and Webb and the fact that there is in this case no direct evidence of negligence by the defendant but only the inference of negligence to be drawn by the finding of the mouse in the bottle, this inference being certainly much weakened by the evidence that the bottle in question may have been in the retailer's stock-room for as

long as one week before the plaintiff was supplied with the same and that others may have had access thereto in that interval."

There is ample evidence to support the findings of the learned trial judge, by which I am therefore bound.

I think that the appeal fails and should be dismissed with costs.

GILLANDERS J.A.:—The plaintiff appeals from the judgment of His Honour Judge Schwenger, a judge of the County Court of the County of Wentworth, dismissing her action.

The facts out of which the action arose are not in dispute. As found by the learned trial judge, the plaintiff entered a restaurant and ordered a piece of pie and a bottle of Coca-Cola, a beverage which is manufactured, bottled, and supplied by the defendant. The waitress who served the plaintiff removed the cap on the bottle with an opener and noticed nothing unusual about the opened bottle. In the words of the trial judge:—

"The beverage was not opaque and the bottle was of clear glass without labels or other obstruction to prevent a view of the contents. The beverage itself is deeply coloured but transparent and not so densely coloured that, under ordinary circumstances and ordinary lighting conditions, any one looking at the bottle would be unable to see any unusual matter which might be in it. The plaintiff, in her evidence, admitted that if she had examined the bottle in question, she might have seen the foreign matter that was in it, which is the cause of this action.

"Owing to the fact that it was the middle of the afternoon and a quiet period in the restaurant, the lighting facilities were not all in use and the plaintiff was served in a subdued light, which was such that an inspection of the bottle could not be had by simply looking at it as it rested upon the table. It would have been necessary to procure better light either by holding the bottle up against some source of light or by going to a window or door to obtain additional light and visibility."

The plaintiff, finding that the Coca-Cola possessed a bad taste, complained to the waitress. The bottle was then taken to the doorway for examination in better light. On inspection of the bottle a dead mouse was discovered in the contents, to the disgust of the plaintiff. She thereupon felt sick, suffered from nausea and vomiting, and was under medical care for several days. Subsequently she brought this action against the alleged manufacturer and distributor of the beverage for damages.

The learned trial judge held that the facts were so similar to those in *Saddlemire v. Coca-Cola Company of Canada*, [1941] O.W.N. 392, [1941] 4 D.L.R. 614, that the decision in that case was applicable, and dismissed the plaintiff's action.

The appeal raises two questions for consideration: (1) whether there was in the circumstances such "reasonable possibility of intermediate examination" of the Coca-Cola before consumption as to insulate the manufacturer from liability in law; (2) whether it is established that the bottle of Coca-Cola in question was the product of the defendant and reached the plaintiff in the form in which it left the defendant.

Dealing with the first question raised, the liability in tort of a manufacturer to the ultimate consumer was exhaustively considered and authoritatively stated by the House of Lords in 1932 in the "Snail in the Bottle" case, *McAlister (or Donoghue) v. Stevenson*, [1932] A.C. 562. In that case Lord Atkin, after a very elaborate and careful review of the authorities, concisely states the proposition to be that "a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

This statement of the law to be applied has since been recognized as the rule to be followed in such cases, although there has been some difference of opinion and discussion as to how the proposition thus stated should be interpreted and applied under different circumstances. See *Farr v. Butters Brothers and Company*, [1932] 2 K.B. 606; *Grant v. Australian Knitting Mills, Limited et al.*, [1936] A.C. 85; *Drafsfield v. British Insulated Cables, Limited* (1937), 54 T.L.R. 11; *Paine v. Colne Valley Electricity Supply Co. Ltd., and British Insulated Cables, Ltd.*, [1938] 4 All E.R. 803; *Herschtal v. Stewart and Ardern, Limited*, [1940] 1 K.B. 155; *Haseldine v. C. A. Daw & Son, Ltd. et al.*, [1941] 3 All E.R. 156. See also a discussion of the question in 1938, 54 L.Q.R. 59, and by the editor of the Canadian Bar Review in 1939, vol. 17, p. 210; 1942, vol. 20, p. 65.

In *Farr v. Butters*, *supra*, crane manufacturers sold a crane in parts to a firm of builders, to be assembled by the builders'

men. Defects were discovered in the course of erection by an experienced erector who was an employee of the builders, but before remedying the defects he commenced working the crane. Due to the defects, part of it fell and killed him, and an action was brought for damages for his death. After examining the *Donoghue* case, Scrutton L.J. held that there was "ample opportunity for intermediate examination", and that the claim failed. Lawrence L.J., agreeing, pointed out that "the defect in certain of the parts was patent and discoverable, and was in fact discovered by the deceased before he put the crane in operation." Greer L.J. agreed, and in discussing this aspect of the case said, in reference to the *Donoghue* case, "As I read the judgment of the House of Lords, the fact that in that case the defect was not discoverable by such a reasonable examination as ought to be anticipated distinguishes the case from this one."

In *Grant v. Australian Knitting Mills, supra*, the plaintiff had purchased underwear from a retailer, and by reason of the negligence of the manufacturer it contained a deleterious substance from which the plaintiff suffered injuries. Lord Wright applied the principle stated by Lord Atkin in *Donoghue's* case, saying, at p. 105:

"The principle of *Donoghue's* case can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent: the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance.

"If the foregoing are the essential features of *Donoghue's* case, they are also to be found, in their Lordships' judgment, in the present case. The presence of the deleterious chemical in the pants, due to negligence in manufacture, was a hidden and latent defect, just as much as were the remains of the snail in the opaque bottle; it could not be detected by any examination that could reasonably be made. Nothing happened between the making of the garments and their being worn to change their condition. The garments were made by the manufacturers for the purpose of being worn exactly as they were worn in fact by the appellant; it was not contemplated that they should be first washed."

Dransfield v. British Insulated Cables, supra, arose from the breaking of a "bull-ring" manufactured by the defendants, resulting in the death of an employee of the corporation which had purchased from the defendants. The corporation relied on the manufacturers, and did not conduct any tests as to the strain which the rings would bear, although they were equipped and competent to have made such tests. Hawke J., who tried the case, rejected the argument that under the decision in *Donoghue's* case "the duty exists not merely where there is an opportunity of examination by the intermediate party, not merely when the form in which the products are sold to the purchaser is such that the purchaser is, so to speak, prevented from making an intermediate examination, but that the duty exists where the manufacturer does not in fact contemplate and need not reasonably contemplate the intervention of intermediate examination, and that the manufacturer is liable unless he can reasonably contemplate that anybody is going to make an intermediate test of an effective nature." He continued: "I do not think that this is the principle laid down in *Donoghue v. Stevenson (supra)*. I think that the principle depends on opportunity of examination."

Doubt is cast upon the correctness of the decision in that case by the remarks of Goddard L.J., in *Haseldine v. Daw, supra*.

In the *Paine* case, *supra*, Goddard L.J., considering a similar question, said, at p. 808:

"It seems clear that, in speaking of the prevention, or of the reasonable possibility, of examination, Lord Atkin meant prevention or no possibility in a business sense. A person who buys 100 cases of tinned salmon from the packers has a physical opportunity of examining each tin. Commercially speaking, it would be impossible for him to do so, nor would anyone expect it, as by opening the tins he would spoil the contents before they could be sold. Perhaps, therefore, without disrespect, the word 'probability' may be substituted for 'possibility'. If there be such a probability, the relationship between manufacturer and ultimate user or consumer will not be proximate. Something is interposed which prevents the forging of a link between the two. Some day, perhaps, it may be held that, if a man negligently constructs or compounds something which he knows the employees or customers of his customer must use, he will not be allowed to rely on the fact that his customer ought to have examined the goods and did not do so. I do not think, however, that I

have any right so to hold, and I must regard *McAlister* (or *Donoghue*) *v. Stevenson* as showing that, if there is a probability of examination, the proximate relationship of the manufacturer will not extend beyond his customer."

In *Herschthal v. Stewart and Ardern Ltd.*, *supra*, Tucker J. exhaustively and carefully discusses the point now under consideration. He expresses the view that under the decision in *Donoghue's* case, properly applied, "the mere existence of the opportunity for examination is not sufficient to break the chain or destroy the proximate relationship."

In *Haseldine v. Daw*, *supra*, Scott L.J., dealing with the criterion of remoteness, "to use the only word which, for want of a better, is available" refers to *Herschthal v. Stewart and Ardern*, expresses his "general agreement with that closely reasoned judgment" and concludes: "if ever there was a case where a repairer, when sending out for immediate use a machine in a condition made dangerous by his professional want of skill or care, could not and would not 'reasonably anticipate any intermediate examination before use,' it is the case of a repair to a lift which is intended to be used by a non-expert porter as soon as the repair is finished."

Goddard L.J., in the same case, expresses the same views as those expressed by him in the *Paine* case. After making reference to Lord Wright's judgment in *Grant's* case, he says, at p. 184:

"If, then, there was any doubt about the governing principle of *McAlister* (or *Donoghue*) *v. Stevenson*, Lord Wright has dissipated it. The manufacturer was held liable, not because he was interested in his product being used as it left his factory, but because he had no reason to contemplate an examination by the retailer or ultimate buyer before use."

There are other statements in the judgment of Lord Atkin, and members of the Court who reached the same conclusion, in *Donoghue's* case, which are not without importance in considering the question under discussion.

In referring to Lord Esher's judgment in *Heaven v. Pender* (1883), 11 Q.B.D. 503, Lord Atkin, at p. 582, draws "particular attention to the fact that Lord Esher emphasizes the necessity of goods having to be 'used immediately' and 'used at once before a reasonable opportunity of inspection'. This is obviously to exclude the possibility of goods having their condition altered

by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed."

Again, referring with approval to the judgment of Cardozo J. in *MacPherson v. Buick Motor Company* (1916), 217 N.Y. 382, he says:

"It might be that the course of business, by giving opportunities of examination to the immediate purchaser or otherwise, prevented the relation between manufacturer and the user of the car being so close as to create a duty."

It may also be noted that Lord Atkin, in discussing the case of *Bates et al. v. Batey & Co. Limited*, [1913] 3 K.B. 351, observes, at p. 595:—

" . . . on the assumption that the jury were right in finding a lack of reasonable care in not examining the bottle, I should have come to the conclusion that, as the manufacturers must have contemplated the bottle being handled immediately by the consumer, they owed a duty to him to take care that he should not be injured externally by explosion, just as I think they owed a duty to him to take care that he should not be injured internally by poison or other noxious thing."

Lord Macmillan, in the *Donoghue* case, at p. 622, states:—

"I can readily conceive that where a manufacturer has parted with his product and it has passed into other hands it may well be exposed to vicissitudes which may render it defective or noxious, for which the manufacturer could not in any view be held to be to blame. It may be a good general rule to regard responsibility as ceasing when control ceases. So, also, where between the manufacturer and the user there is interposed a party who has the means and opportunity of examining the manufacturer's product before he re-issues it to the actual user. But where, as in the present case, the article of consumption is so prepared as to be intended to reach the consumer in the condition in which it leaves the manufacturer, and the manufacturer takes steps to ensure this by sealing or otherwise closing the container so that the contents cannot be tampered with, I regard his control as remaining effective until the article reaches the consumer and the container is opened by him. The intervention of any exterior agency is intended to be excluded, and was in fact in the present case excluded."

In the case at bar the defendants' product was "so prepared as to be intended to reach the consumer in the condition" in which it left the defendants, and they must have contemplated that the bottle would, or might, be opened and the contents used immediately. It could not be said that the defendants could reasonably anticipate any intermediate examination before use of the product. With the control of the defendants continuing in the sense that the bottle was capped and the whole intended for use in the condition in which it was supplied, it would be a very restricted construction to put on Lord Atkin's statement to hold that merely because an intermediate examination was capable of being made, that would have disclosed a foreign object in the bottle (although in the ordinary course of things there was no likelihood that such an examination would be made) the manufacturer was thereby absolved from liability. I do not think the statement should be so read and applied to the circumstances in this case, and hold the view that under the circumstances here there was no reasonable possibility of intermediate examination which would absolve the respondents if they were otherwise liable.

On the question as to whether the bottle served to the appellant was the product of the respondents and reached the appellant in the form in which it was supplied by the respondents, the trial judge has expressed his findings as follows:—

"There is no doubt, on the evidence, that there was a mouse in the bottle in question. A great deal of evidence was given by the defence as to how it could have gotten there. This evidence was subjected to vigorous cross-examination but was not rebutted by any contradictory evidence. I am satisfied that no mouse could get into a bottle during the period it was being processed by being received at the washing machine and thence proceeding by various steps through the stages until it became a capped bottle of Coca-Cola, ready for sale to the public. It appears to me as conclusive that it must have been in the bottle before it went to the washing machine or to have been placed there surreptitiously after its processing had been completed. If I were called on to determine this point, I feel I would be compelled to the latter conclusion in view of the uncontradicted technical evidence of the expert witnesses Mitchell and Webb and the fact that there is in this case no direct evidence of negligence by the defendant but only the inference of negligence to be drawn

by the finding of the mouse in the bottle, this inference being certainly much weakened by the evidence that the bottle in question may have been in the retailer's stock-room for as long as one week before the plaintiff was supplied with same and that others may have had access thereto in that interval."

I take it from these findings that the trial judge does not doubt that the bottle and the contents, apart from the dead mouse, were supplied by the respondents. Of the two alternatives, that the mouse was in the bottle before it went to the washing machine or that it was placed in the bottle surreptitiously after the processing had been completed, the learned judge, if necessary, would find the latter. There is no evidence to support such a finding, other than whatever inference, if any, should be drawn if other possibilities can be eliminated. To place a dead mouse in a bottle of soft drink after processing would, under the circumstances here, be highly mischievous. It might possibly make the person responsible, if discovered, subject to criminal prosecution. There is a presumption against such an act.

In the case of a lost will, there is a presumption against fraud and accident and in favour of the view that the document was intentionally destroyed by the testator. See *Re Perry*, 56 O.L.R. 278, [1925] 1 D.L.R. 930, per Middleton J.A. at p. 281; *Allan v. Morrison et al.*, [1900] A.C. 604. There is, I think, a presumption here which might, of course, be rebutted, against a finding that the dead mouse was mischievously put in the soft drink after processing and after it left the respondents' possession.

The learned trial judge found the evidence of inspection during processing impressive. The respondents' system was no doubt designed to be "fool-proof" in the words of Lord Wright in *Grant's* case, referred to by Middleton J.A. in *Shandloff v. City Dairy Ltd. and Moscoe*, [1936] O.R. 579, [1936] 4 D.L.R. 712.

The only evidence as to the condition of the bottle at the time it was served—that the contents "fizzed" when the cap was removed—would be against any inference of mischievous interference after processing, and would indicate that the control of the manufacturer still existed. Even with a system designed to be perfect, the possibility of human error remains.

On all the evidence here the appellant must be held to have sufficiently established her case. The appeal must be allowed with costs, and the appellant should have judgment for \$350.00,

the amount at which her damages were assessed, with costs on the County Court scale.

*Appeal allowed with costs, HENDERSON J.A.
dissenting.*

Solicitor for the plaintiff, appellant: A. M. Lewis, Hamilton.

*Solicitor for the defendant, respondent: C. W. R. Bowlby,
Hamilton.*

[COURT OF APPEAL.]

Rex v. Abbott.

*Criminal Law—Jurisdiction of Courts—Obtaining by False Pretences—
Where Offence Committed—Accused “in custody” within Territorial
Limits of Jurisdiction—The Criminal Code, R.S.C. 1927, c. 36, ss.
405(1), 577, 584(b).*

The accused, in Toronto, represented to one Jones that he was the owner of an oil well near Collingwood, in the county of Simcoe, and invited Jones to buy a one-half interest. Jones declined to make any arrangement without seeing the property, and the accused drove him to Collingwood, where they inspected the well. After their return to Toronto the transaction was completed, and Jones paid \$500 to the accused, for which he received what purported to be an assignment of a one-half interest in the well. The accused was not in fact the owner of more than a minor interest (if any) in the well. The accused was arrested in Toronto, and was taken to Barrie, in the county of Simcoe, where a preliminary hearing was held and the accused was committed for trial. He was later indicted, at Barrie, in the Court of General Sessions, upon an indictment charging him with obtaining \$500 by false pretences in the county of Simcoe and elsewhere in the Province of Ontario. The accused was convicted and appealed, arguing that the offence had been wholly committed in Toronto, and that the court in the county of Simcoe had no jurisdiction to try him.

Held, the conviction was properly made, and the appeal must be dismissed.

Per Robertson C.J.O. and Laidlaw J.A.: As soon as the accused was committed for trial in the county of Simcoe he was “in custody” in that county, within the meaning of s. 577, upon the very charge which was later established. *Rex v. O’Gorman et al.* (1909), 18 C.L.R. 427, distinguished. There was nothing in *Reg. v. Ellis*, [1899] 1 Q.B. 230, which made the indictment defective, and it could not be said that the offence was wholly committed at Toronto. The visit to the well, and what took place there, was an element of the crime, and a material circumstance, even if it was not “the gist and kernel of the offence”.

Per Kellock J.A.: There was, on the visit to the well, a continuing representation that the accused was the owner. Notwithstanding what was said by Wills J. in *Reg. v. Ellis, supra*, the false pretence was a necessary ingredient of the offence, and since it had been made in the county of Simcoe as well as in Toronto, it could not be said that the offence charged was not that of which the accused was convicted, or that it was improperly described. *Reg. v. Leech* (1856), 25 L.J.M.C. 77; *Reg. v. Holmes* (1883), 12 Q.B.D. 23, referred to. It was not incorrect to describe the offence as having been committed where any of the false pretences were made “and elsewhere”, as had

been done here. There could be no question of the jurisdiction of the court in Simcoe, in the circumstances outlined in s. 577, to try the offence with which the accused was charged, regardless of where it had been committed in the Province.

AN appeal by the accused from his conviction for obtaining \$500 by false pretences. The facts are fully stated in the reasons for judgment of ROBERTSON C.J.O.

8th February 1944. The appeal was heard by ROBERTSON C.J.O. and KELLOCK and LAIDLAW J.J.A.

G. A. Martin, for the accused, appellant: There is an important jurisdictional point to be argued in this appeal. Under s. 584(b) of The Criminal Code, R.S.C. 1927, c. 36, the venue must be in the district where the transaction began or ended. [ROBERTSON C.J.O.: The venue must be wherever an integral part of the transaction takes place.] The accused, if he committed any offence, did not do so in the county of Simcoe. The present case is within the decision of *Rex v. O'Gorman et al.* (1909), 18 O.L.R. 427, 15 C.C.C. 173. There was no jurisdiction in the Court that tried him; therefore the trial was a nullity. The appellant does not come within the exceptions specified in s. 577 of the Code, inasmuch as he was not apprehended or in custody in any place in the county of Simcoe, but resided in the city of Toronto, where he was arrested, and was taken to the county of Simcoe under process. No element of the offence charged was committed where the trial took place.

Further, the judge in his charge did not put the theory of the defence before the jury, the defence being that the accused was an unlettered man.

W. B. Common, K.C., (J. A. Mahon with him), for the respondent: S. 577 of The Criminal Code provides that an accused can be tried where he is in custody within the jurisdiction of the trying court. He is in custody when he surrenders himself to the sheriff, and in this case the court which tried him did have jurisdiction because the crime committed was one that the court had jurisdiction to try: *Rex v. Rochon* (1923), 35 Que. K.B. 208, 42 C.C.C. 323. S. 584 of The Criminal Code has precisely the same wording as the English Statute mentioned in *Reg. v. Ellis*, [1899] 1 Q.B. 230, and the principles discussed therein at p. 234 are applicable to the case at bar. Here, false representations were made first in the county of York, second, in the county of Simcoe, and third in the county of York. There-

fore the charge can be tried in either county. An offence begun within one jurisdiction and completed within another may be considered as having been committed in either of them: *Reg. v. Hogle* (1896), 5 Que. Q.B. 59, 5 C.C.C. 53. The latter case was applied in *Rex v. Solloway*, [1934] O.R. 31, 61 C.C.C. 297, which also distinguished *Rex v. O'Gorman et al.*, *supra*. [ROBERTSON C.J.O.: If the place alleged is important, then unless it is found that some part of the offence was committed in the place alleged there should be no conviction without an amendment.] A charge of false pretences is similar to one of conspiracy. With reference to the latter, it has been said that the criminal acts of the parties accused, done in pursuance of an apparent criminal purpose, are hardly ever confined to one place, and that there seems to be no reason why the crime of conspiracy may not be tried wherever one distinct overt act of conspiracy is in fact committed: *Rex v. Brisac and Scott* (1803), 4 East 164, 102 E.R. 792. In addition to the provision in s. 577 of the Code, s. 584(b) gives magisterial jurisdiction. The charge here was laid in Simcoe because it was close to the property in question, if the jury wanted to view the well. As far as the appellant's objection to the charge is concerned, there was no evidence of any theory of defence. The accused, as a matter of fact and law, owned nothing at the time he obtained the money from the complainant.

G. A. Martin, in reply: *Reg. v. Hogle*, *supra*, is distinguishable because it is within the provisions of s. 584(b). [LAIDLAW J.A.: Was not the conduct of the accused part of a chain of false pretences? If part of the act of false pretences took place in Simcoe, would that not be justification for the trial being held in Simcoe?] The beginning or end of the offence would be the relevant aspects of the offence.

Cur. adv. vult.

13th March 1944. ROBERTSON C.J.O.:—This is an appeal from the conviction of the appellant on a charge that, on or about the 31st August 1942, he did, at the township of Nottawasaga, in the county of Simcoe, and elsewhere in the Province of Ontario, by false pretences, and with intent to defraud, unlawfully obtain the sum of \$500 from one Thomas Jones, contrary to s. 405(1) of The Criminal Code, R.S.C. 1927, c. 36. There is also an appeal from the sentence imposed of two years in

Kingston penitentiary. The trial took place at the General Sessions of the Peace for the County of Simcoe, with Judge Harvie presiding.

Both appellant and Thomas Jones reside in Toronto. The appellant proposed to Jones that Jones should buy from him, for the sum of \$500, a one-half interest in an oil well, of which the appellant represented that he was the owner. The oil well was in the county of Simcoe, a short distance out of the town of Collingwood. Jones was interested, but would not commit himself until he had been shown the oil well. The appellant took Jones in his motor car and showed him a property near Collingwood as the property in which he was offering to sell Jones a one-half interest. There was a well there, with some machinery and some oil. Jones was satisfied, although he did not say so at the time, but a few days after their return to Toronto the transaction was completed there. Jones paid over his \$500 and received a document purporting to assign to him a fifty per cent. interest in the oil business that the assignment more particularly described. The false pretences alleged are not in respect of the character of the well or its value, but in respect of the interest that the appellant had in it. He may have had some small proprietary interest, although even that is not clear, but it is quite clear that any interest he may have had was only a minor one, and that he was in no position to sell and assign to Jones a one-half interest.

Objection is taken on this appeal that the Court of General Sessions of the Peace of the County of Simcoe had no jurisdiction to try the appellant for the offence. It is contended that while the indictment, as well as the information, alleges an offence committed at the township of Nottawasaga, in the county of Simcoe, and elsewhere in the Province of Ontario, the evidence discloses an offence committed wholly in Toronto, in the county of York. *Reg. v. Ellis*, [1899] 1 Q.B. 230, is relied upon as establishing that the gist of the offence of obtaining goods by false pretences is the obtaining of the goods, and not the using of improper means whereby the goods are obtained. In the *Ellis* case, the prisoner, who had been adjudged a bankrupt, was charged with obtaining in the county of Durham, in England, certain property on credit, by false representations which were made in Glasgow, out of the jurisdiction of the English court, and the question was whether he could be tried, for the offence

charged, at the Durham Assizes. It was held that he could be so tried. It was said that the making of the false representations is an element in the crime, and without it there would be no crime. It is a material circumstance, but the gist and kernel of the offence is the obtaining of the goods by improper means, and there was, therefore, an entire offence within one county, though the circumstance that stamped it with illegality took place beyond the jurisdiction.

It is further contended that the common law rule, that the trial of a criminal offence must take place in the county or district in which the crime was committed, still prevails, and *Rex v. O'Gorman et al.* (1909), 18 O.L.R. 427, 15 C.C.C. 173, is cited.

It is further contended that this case is not within s. 584(b) of The Criminal Code, which provides that where an offence is begun within one magisterial jurisdiction and completed within another, such offence may be considered as having been committed in any one of such jurisdictions, because both the beginning and the completion of this offence were in Toronto, in the county of York, and only an intermediate act was done in the county of Simcoe.

For the Crown, s. 577 of The Criminal Code is relied upon. It is as follows:—

“Unless otherwise specially provided in this Act, every court of criminal jurisdiction in any province is competent to try any crime or offence within the jurisdiction of such court to try, wherever committed within the province, if the accused is found or apprehended or is in custody within the jurisdiction of such court or if he has been committed for trial to such court or ordered to be tried before such court, or before any other court, the jurisdiction of which has by lawful authority been transferred to such first mentioned court under any Act for the time being in force.”

The appellant was arrested at Toronto, but after his arrest he was taken before a magistrate in the county of Simcoe, and on his committal for trial he was in custody in the county of Simcoe. The charge in the information by which the prosecution was commenced alleged an offence committed at the township of Nottawasaga, in the county of Simcoe, and elsewhere in the Province of Ontario. The warrant by which the appellant was committed for trial, and the indictment on which he was tried

and convicted, contained the same allegation. The facts as to the visit to the oil well, to which I have already made reference, were in evidence at the trial. This case is distinguishable from the case of *Rex v. O'Gorman*, in which s. 577 of the Code was also relied upon by the Crown as giving jurisdiction. In the *O'Gorman* case the conviction was in the County Court Judges' Criminal Court for the County of York. The charge was of conspiracy committed in the county of York and the county of Middlesex. The evidence, however, disclosed only a conspiracy wholly entered into and wholly carried on in the county of Middlesex. The Court of Appeal said in that case that the charge as made was not of the same offence as the charge proved. The accused was, therefore, not in custody in the county of York on the charge that was proved, the allegation of the place at which the offence was committed being a material one.

The proceedings in the present case are not open to the objection to which effect was given in the *O'Gorman* case. The offence charged in this case, and in respect of which the appellant was in custody in the county of Simcoe at the time of his trial, is the same offence for which he was tried, and of which he was convicted, in that county.

I do not think there is anything in the decision in *Reg. v. Ellis, supra*, that prevents the description of the offence charged in this present case from being a proper and sufficient description. While possession of the \$500 was obtained in Toronto, and the first misrepresentations were made in Toronto, yet what occurred in the exhibition to Jones of the well near Collingwood, as the well in which he was offered a one-half interest by Abbott, as its owner, was an important, and in fact the determining, factor, in inducing Jones to part with the \$500. It is provided by s. 853 of the Code that:—

“Every count of an indictment shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to: Provided that the absence or insufficiency of such details shall not vitiate the count.”

The accused had ample information, in both the information and the indictment, to identify the transaction referred to. He did not ask for particulars, and there has been no complaint that he did not know with what he was charged. The exhibition

to Jones of the well was an element in the crime, and a material circumstance, even if it was not the "gist and kernel of the offence", to use the words of Wills J. in the *Ellis* case. It is to be remembered that the *Ellis* case deals with jurisdiction, and not with the form of the indictment, and further, it is concerned with the question of jurisdiction to try the accused in the county of Durham, where the property was obtained, and does not decide, and, I presume, could not decide, that the accused might not have been tried in Glasgow on a charge describing the offence, with special reference to what had occurred in that jurisdiction. Neither does the *O'Gorman* case stand in the way, for in that case nothing that formed part of the offence had, in fact, occurred in the county of York.

Authority is not wanting to support the jurisdiction of the court that tried this case. In *Rex v. Thornton* (1915), 9 Alta. L.R. 163, 9 W.W.R. 825, 33 W.L.R. 178, 26 C.C.C. 120, 30 D.L.R. 441, the Court of Appeal of the Province of Alberta held that although the offence may have been committed outside the territorial limits of the jurisdiction of the Court in which the trial is held, the fact that the accused is in custody within these limits gives the Court jurisdiction to try the charge, by virtue of s. 577.

The Court of Appeal of British Columbia came to a like conclusion, and cited, with approval, the last-mentioned case, in *Rex v. Nevison*, 27 B.C.R. 12, [1919] 1 W.W.R. 793, 31 C.C.C. 116, 45 D.L.R. 382.

There is a useful decision of the Court of King's Bench of the Province of Quebec, *Rex v. Rochon* (1923), 35 Que. K.B. 208, 42 C.C.C. 323. In that case indictments were presented by the grand jury of the district of St. Francis, reciting that the offences were committed at Montreal. The accused had been brought on a warrant before the magistrate of the district of St. Francis, and was by him committed for trial. He was, therefore, in custody there, and by virtue of s. 577 it was held that such custody gave the necessary jurisdiction to try the accused in that district. It was further held that the accused had no remedy by objection to the jurisdiction, and that his only course would be to apply, under s. 884 of the Code, to change the place of trial.

The objection to jurisdiction therefore fails. There was ample evidence to warrant the jury in convicting the appellant, and the proceedings at the trial do not afford the appellant any

ground of appeal from his conviction. Neither does there appear to have been any error in principle on the part of the trial judge in imposing sentence.

The appeal as against both conviction and sentence is, therefore, dismissed. Any period of time that the appellant has been in custody since his conviction should be allowed to him as time served under the sentence.

KELLOCK J.A.:—To the facts as stated by my Lord, I would add only that the complainant stated in evidence that he had told Abbott in Toronto, before going to Collingwood, that he would have nothing to do with the matter unless he saw the well. It was as a result of this that the appellant took Jones to Collingwood. Jones does not say that the representation that Abbott was the sole owner of the well was repeated on that occasion, but in my opinion, on the authorities, there was, on that occasion, a continuing pretence to that effect: *Reg. v. Welman* (1853), 22 L.J.M.C. 118; *Reg. v. Ellis*, [1899] 1 Q.B. 230.

The indictment, and indeed also the information and warrant, charge that the appellant “at the Township of Nottawasaga, in the County of Simcoe, and elsewhere in the Province of Ontario, did, by false pretences and with intent to defraud, unlawfully obtain” and so forth. It is contended on behalf of the appellant that “There is nowhere on the record any evidence that accused made any false representation in the County of Simcoe before the money was obtained”, and that “The evidence established also that the statement alleged to be false was made in Toronto, so that *both elements* of the offence took place in the County of York, and there was, therefore, no warrant whatever for the allegation in the *indictment* that the offence was committed in the County of Simcoe.” (The italics are mine.) In my opinion this contention is disposed of by the cases already referred to.

I take it that in confining his complaint to the indictment, appellant does so because of the existence in The Criminal Code of s. 577, and of the decision of this Court in *McGuiness v. Dafoe* (1896), 23 O.A.R. 704, 3 C.C.C. 139, the result of which is that, however illegal an arrest and detention may be, the jurisdiction of the court by which he was convicted attached when the appellant was before it, charged with the offence. It cannot be questioned that the Court of General Sessions of the Peace held in

the county of Simcoe would have, in the circumstances outlined in s. 577, jurisdiction to try the offence with which the appellant was charged, regardless of where it had been committed within the Province. The appellant complains, however, that there was "no warrant whatever for the allegation in the indictment that the offence was committed in the County of Simcoe", and he contends that this case is governed by the decision in *Rex v. O'Gorman et al.* (1909), 18 O.L.R. 427, 15 C.C.C. 173. In that case the offence in question was that of criminal conspiracy, the offence being charged as having been committed at Toronto and London. The evidence established that the offence had been committed wholly at London, no overt act having taken place at Toronto. It was held, to employ the language of Garrow J.A., at p. 432, "that a charge of conspiracy committed at the county of York and the county of Middlesex is not the same offence as a charge of the same offence of conspiracy committed at the county of Middlesex alone." In speaking of the accused he continues: "They have never to this moment been charged either before a justice or elsewhere with the offence of which they have been found guilty, namely, a conspiracy wholly entered into and wholly carried on in the county of Middlesex. . . . The allegation of the place at which the offence was committed was a material one, and necessary to be proved to confer the jurisdiction." Accordingly, it was held that the accused had been convicted of an offence with which they had not been charged.

By s. 853, it is provided that every count of an indictment shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to, but that the absence or insufficiency of such details shall not vitiate the count. By s. 859(b), the Court may order the prosecutor to furnish a particular of any false pretences charged. In *Reg. v. Leech* (1856), 25 L.J.M.C. 77, it was held, on a case reserved, that the offence consists "in the false pretence, and in the obtaining money by means of it." It was the view of Lord Coleridge C.J. in *Reg. v. Holmes* (1883), 12 Q.B.D. 23 at 24, that there are "two necessary ingredients" of the offence. Those ingredients are, of course, the false pretence and the obtaining of the money thereby. As the false pretence in the case at bar did take place in the county of Simcoe as well as at Toronto, I do not think it can be said that the

offence charged was not the offence of which the appellant was convicted, or that it was improperly described.

S. 577 provides that "Unless otherwise specially provided in this Act, every court of criminal jurisdiction in any province is competent to try any crime or offence within the jurisdiction of such court to try, wherever committed within the province, if the accused . . . is in custody within the jurisdiction of such court, or if he has been committed for trial to such court or ordered to be tried before such court. . . . "

In my opinion, the above-quoted provisions of the section apply, the appellant having been "in custody within the jurisdiction" of the Court of General Sessions on the offence above described, and being, in my opinion, convicted of the very offence charged.

Counsel for the appellant has referred us to *Reg. v. Ellis*, [1899] 1 Q.B. 230, and particularly to the judgment of Wills J. In the course of his judgment Wills J. refers to the cases of *Rex v. Butterly*, cited in 4 B. & Ald. at 179, 106 E.R. at 904, and *Pearson v. M'Gowran* (1825), 3 B. & C. 700, 107 E.R. 893, as establishing that the offence of obtaining goods by false pretences consists in obtaining the goods, and not in the making of the false pretences. At p. 237, Wills J. says: "The making of the false pretences is antecedent to, and not a part of, the obtaining the goods. The gist and kernel of the offence is the obtaining the goods by improper means, not in using the improper means whereby goods were obtained, and there was therefore *an entire offence within the one county*, though the circumstance which stamped it with illegality took place beyond the jurisdiction. . . . It [i.e., the false pretence] is, in fact, by those decisions [*Rex v. Butterly* and *Pearson v. M'Gowran*] reduced to a mere piece of the evidence necessary to constitute the offence." (The italics are mine.)

At p. 234, however, Wills J. says: "In England itself the question of jurisdiction as between two counties, where the false representations were made in one county and the goods obtained in another, has not been capable of being raised since 1826, for by 7 Geo. IV., c. 64, s. 12, it was provided that where any felony or misdemeanour shall be begun in one county and completed in another, it may be dealt with in any of the said counties in the same manner as if it had been actually and wholly committed therein." If it be correct to say that the result of *Rex v. Butterly*

and *Pearson v. M'Gowran* is that the *entire offence* takes place where the property is obtained, and that the false pretence is a mere piece of evidence, it is somewhat difficult to say that the offence was "begun" at any point anterior to the delivery of the property, or that the statute referred to by Wills J., which corresponds to s. 584(b) of the Code, has any application. At p. 241, Wright J., referring to *Rex v. Butterly*, says: ". . . the ground of the objection and decision was that the grand or the petty jury could not take cognizance of the case if the goods were obtained in another county." In my opinion, if it be correct to say, as I think it is, that in a case where the false pretences are made in one county, and the property is obtained in another, the offence is commenced in the one and completed in the other, it is not incorrect to describe the offence as having been committed where any of the false pretences were made, "and elsewhere", as was done in the indictment under consideration, even although the case may perhaps not be strictly within s. 584(b) (which I do not decide), because of the fact that the false pretence, although repeated or continued elsewhere, was first made in the county where the goods were handed over, or some other county, and the offence, therefore, may be said to have "commenced" there. Accordingly, I do not think the indictment is open to the objection made concerning it, and I think that the appellant was properly in custody in the county of Simcoe on the offence with which he was charged and of which he was convicted. I refer also to *Reg. v. Richards* (1884), 48 J.P. 149. As I see no ground for interfering with the sentence, I would dismiss the appeal.

LAIDLAW J.A. agrees with ROBERTSON C.J.O.

Appeal dismissed.

*Solicitor for the accused, appellant: J. P. Arnott, Toronto.
Solicitor for the Crown, respondent: J. A. Mahon, Toronto.*

[COURT OF APPEAL.]

Emberson et al. v. Fisher et al.

Partnership—Dissolution by Death of Partner—Rights of Surviving Partners and of Personal Representative of Deceased Partner—Personal Representative Carrying on Business as Estate Asset—Winding-up and Damages—The Partnership Act, R.S.O. 1937, c. 187, ss. 39, 44(b).

Where a partnership is dissolved by the death of a partner, the surviving partners are entitled to have the partnership wound up, and the assets, including the good will, sold. If the administratrix of the deceased partner carries on the partnership business as an asset of the estate, excluding the other partners from participation, claiming that no partnership existed in fact, the surviving partners will be entitled to recover from the administratrix the loss, if any, which results from the wrongful act of carrying on the business. This loss will be the difference between the amount actually realized by the sale of the partnership assets and the amount which they would have realized if sold at the proper time and under the best conditions, with interest from the time at which they should have been sold. This loss will constitute a charge upon the share of the deceased partner in the partnership assets, and if this share is insufficient the administratrix will be personally liable for the deficiency. If, further, the circumstances are such that the administratrix is entitled to indemnity against the general estate of the deceased partner, the surviving partners will be entitled to be paid the amount of such deficiency out of that estate.

AN appeal by the defendants from the judgment of Hogg J., [1943] O.R. 211, [1943] 2 D.L.R. 152. Further reasons for judgment of Hogg J., on a motion to vary the terms of the judgment as settled, are noted in [1943] O.W.N. 758.

21st, 22nd and 23rd February 1944. The appeal was heard by GILLANDERS, KELLOCK and LAIDLAW J.J.A.

G. T. Walsh, K.C. (M. C. McLean with him), for the defendants, appellants: There was no partnership, and any right to which the plaintiffs may be entitled is not based upon partnership but is in the nature of a recompense for services rendered, since they were mere employees of the deceased. The documents filed with the bank, produced by the plaintiffs in support of their contention, were never intended to be evidence of a partnership, but simply facilitated banking arrangements between the plaintiffs and their employer. [KELLOCK J.A.: In that case, why would not an ordinary power of attorney have been sufficient?] [LAIDLAW J.A.: The deceased and the plaintiffs signed a document which was headed "partnership account."] If a true partnership had existed, the land would have been included, which was never the case. Other documents indicate that Fisher was the sole proprietor of the business. On 11th July 1935 he executed a declaration to that effect. [LAIDLAW J.A.: If there

was an existing partnership, how could that document have dissolved it, without the consent of the plaintiffs? They said, in effect, that if he would provide for them according to his unexecuted will, they would consent to a dissolution. If there was a partnership, the onus is on you to show that it was dissolved.] The plaintiffs contributed nothing to the assets except a little furniture. [GILLANDERS J.A.: The business was something in which all three took part, and the inference is that they were working in partnership and that all were interested in the profits.]

Even if there was a partnership, the capital should not be divided in the manner directed by the trial judge. [LAIDLAW J.A.: Must you not establish a special agreement if distribution is not to be made in equal shares? If A, B, and C are in partnership, with A contributing all the capital and B and C contributing other things, A will not get back all the capital on dissolution, unless there is an express agreement.] The will recites that the testator is the sole owner of the business; in the face of that, how can the plaintiffs say that two-thirds of it belongs to them? [KELLOCK J.A.: The plaintiffs behaved as they did because they believed that a will had been, or was about to be, executed.] [LAIDLAW J.A.: There is evidence to support the finding that a partnership existed. The important question, to me, is the basis upon which division should be made.]

The land is not a partnership asset; it was the property of the defendant Mrs. Alving, Fisher's daughter. [GILLANDERS J.A.: If Fisher was entitled to deal with it, he could make it partnership property. Mrs. Alving seems never to have exercised any right of ownership.] There was no note or memorandum in writing showing that Fisher or his daughter ever divested themselves of the land, or any interest therein, for the purposes of the alleged partnership, or held it or any interest in it in trust for any other person, as required by s. 4 of The Statute of Frauds, R.S.O. 1937, c. 146.

This case presents more than the usual difficulty because Fisher cannot now explain his intentions regarding the use to be made of the various banking documents. In similar circumstances such documents have been regarded as mere directions to the bank to facilitate business: *Southby v. Southby* (1917), 40 O.L.R. 429, 38 D.L.R. 700; *Smith v. Gosnell* (1918), 43 O.L.R. 123. There are many authorities deciding that the true relation-

ship was that of master and servant, although superficially a partnership seemed to exist; the onus is on the plaintiffs to show that they had been admitted as partners in the business, in the strict legal sense. An indefinite use of the word "partnership" in the correspondence does not amount to evidence of an agreement that there should be a partnership. I refer to *Donkin v. Disher* (1913), 49 S.C.R. 60, 5 W.W.R. 870, 27 W.L.R. 428, 16 D.L.R. 610; *Robert Porter & Sons Limited v. Armstrong et al.*, [1926] S.C.R. 328 at 329, [1926] 2 D.L.R. 340.

There is no sufficient corroboration of the plaintiffs' evidence, as required by s. 11 of The Evidence Act, R.S.O. 1937, c. 119. It has been decided that one defendant cannot corroborate the evidence of another: *Taylor v. Regis* (1895), 26 O.R. 483. The plaintiffs, both interested parties, cannot corroborate each other's evidence: *Hallman et al. v. Bricker*, [1943] O.W.N. 311.

If the finding that there was a partnership is accepted, then we are entitled, in the winding-up, to have the value of the lands and buildings, all moneys expended on boats, and everything contributed by Fisher towards property of a capital nature. [LAIDLAW J.A.: You must establish an express agreement if the distribution is to be on a basis different from that laid down in s. 24 of The Partnership Act, R.S.O. 1937, c. 187.]

The appellant should not be required to pay damages, either personally or as administratrix. She acted only in the exercise of her rights as administratrix. [LAIDLAW J.A.: What right has the personal representative of a deceased partner to do anything in respect of partnership property, to the exclusion of the others?]

The trial judge erred in ordering the appellants to pay costs. Having found that a partnership existed, he should have directed that costs should be paid out of the partnership assets.

F. Erichsen-Brown, K.C. (J. P. Erichsen-Brown with him), for the plaintiffs, respondents: The trial judge found as a fact that each plaintiff was entitled to one-third in the division of the partnership assets. According to their evidence it is clear, apart from the statute, that they were so entitled: *Minister of Stamps v. Townend*, [1909] A.C. 633 at 638. [LAIDLAW J.A.: Have you a finding that they were entitled to one-third each in the capital, as distinguished from profits?] Under the present judgment an account is to be taken by the Master, and he will

determine the respective contributions of the partners. The land clearly became one of the partnership assets.

The trial judge's disposition of costs should be accepted. We adopt his statement that, because of the special circumstances, the rule applicable in ordinary actions between partners, laid down in *Hamer v. Giles* (1879), 11 Ch. D. 942, is not applicable here.

G. T. Walsh, K.C., in reply.

Cur. adv. vult.

15th March 1944. The judgment of the Court was delivered by

LAIDLAW J.A.: This is an appeal by the defendants from the judgment of Hogg J. dated 9th March 1943. The learned trial judge found that a partnership existed between the plaintiffs and the late Alexander D. Fisher, and that the partnership business was being carried on under the name "Pow Wow Point Summer Resort" at the time of the death of Mr. Fisher on 4th December 1938. The Court ordered an accounting and winding-up of the partnership business, and a reference to the Master to give all necessary directions in connection with and incidental thereto; that the assets and business of the partnership be sold; payment to the plaintiffs of one-third each of the net assets of the partnership, and, subject to certain provisions, payment to Margaret B. Fisher as administratrix of the estate of the said A. D. Fisher, deceased, of the remaining one-third share in the net assets of the partnership; that the defendant Margaret B. Fisher pay the plaintiffs the amount of any loss the plaintiffs may have suffered in the amount of their shares in the net assets of their shares in the partnership by the act of the defendant Margaret B. Fisher in taking over the partnership property and carrying on the partnership business after the death of the said A. D. Fisher; that "the amount of any such loss do constitute a charge in favour of the plaintiffs upon the share of the estate of the said A. D. Fisher in the partnership assets"; that the defendant Margaret B. Fisher, personally and as administratrix of the estate of the late A. D. Fisher, be restrained from further dealing with the partnership property; that the ownership of certain lands claimed by the defendant Dorothy Alving forms part of the partnership property and assets; that the plaintiffs recover their costs of the action from the defendants. The Court reserved further direc-

tions and the question of costs of the winding-up proceedings until after the Master should have made his report.

The main grounds of appeal argued before this Court were:

(1) That there was no partnership between the plaintiffs and the late Alexander D. Fisher as found by the learned trial judge;

(2) That if such partnership existed, the division of the net assets thereof as provided in the judgment is wrong;

(3) That the claim for alleged loss by the act of the defendant Margaret B. Fisher in taking over the partnership property and carrying on a partnership business after the death of the said A. D. Fisher cannot be sustained by the evidence or in law; and that the amount of any such loss does not constitute a charge in favour of the plaintiffs as found by the learned trial judge;

(4) That the land at Pow Wow Point was owned by the defendant Dorothy Alving and did not form part of the partnership property and assets;

(5) That there was no note or memorandum in writing to evidence the interest in such land on the part of the partnership, as required by The Statute of Frauds, R.S.O. 1937, c. 146, s. 4;

(6) That there was no corroboration of the plaintiffs' claim as required by The Evidence Act, R.S.O. 1937, c. 119;

(7) That the plaintiffs' only claim in law against the defendants is for services rendered;

(8) That the plaintiffs' claim against Margaret B. Fisher personally ought to have been dismissed;

(9) That the learned trial judge erred in the disposition of costs.

Upon conclusion of argument on behalf of the appellants the Court announced the unanimous opinion of the members that the appellants could not succeed in the argument that no partnership existed between the plaintiffs and the late A. D. Fisher at the time of his death. There was ample evidence upon which the learned trial judge could make a finding of the existence of such a partnership, and the finding cannot be disturbed. While there is evidence upon which a contrary finding might have been made, nevertheless, it is my view that the judgment of the learned trial judge on the evidence was right.

It is said on behalf of the appellants that the late A. D. Fisher made contributions to the capital of the business much in excess

of the contributions made by the plaintiffs. It is argued that under the judgment in appeal the plaintiffs will receive one-third each of the net assets of the partnership without regard to the amount of contributions to capital made by the respective partners. It is argued that such a division would be contrary to the intention of the partners as disclosed by the evidence given on cross-examination by the plaintiff Bertha L. Emberson. Referring to a discussion with the late Mr. Fisher, she states:

"Q. And he said—what was he going to do with the lands and the buildings? A. He was going to put the land and the buildings into the partnership.

"Q. And what was to be paid for the lands and the buildings? A. There was not any discussion about any payment.

"Q. Well, he was to be paid for the lands and the buildings, wasn't he? A. Yes, as the business developed that would be adjusted later on."

.....
"MR. WALSH: Q. If that land was to go into partnership, did you expect he would be paid for it? A. Sometime he would be paid for it, when the business earned it.

"Q. When the business earned it? A. Yes.

"Q. How much would he be paid? A. There was no amount discussed.

"Q. And he has never been paid to this day by anybody for it, has he? A. No.

"Q. No, not a cent. Mr. Nesbitt reminds me, he has never had a cent credit for that, has he, or an entry in the books for it? A. The books have not been properly set. You see, I am not an accountant, and I just kept the books to the best of my knowledge, and we had discussed having an accountant in to go over the books and set these things properly, when all this would be adjusted.

"Q. That may be all right now, after he is gone? A. Yes, sir."

Counsel for the respondents accepts the fact that partnership accounts were never properly set up or kept, and do not now disclose the total capital of the partnership or the amounts contributed thereto from time to time by each of the partners. He states, however, the Master will ascertain this information when he takes accounts as directed by the Court and that the manner and order of distribution of the assets of the partnership

as set forth in s. 44(b) of The Partnership Act, R.S.O. 1937, c. 187, is thereafter applicable. There being no dispute as to the applicability in this case of the rules as set forth in s. 44(b), *supra*, the judgment should substitute the provisions of that section in lieu of para. 4 of the judgment.* The judgment should also set forth "the proportion in which profits are divisible" as referred to in s. 44(b) (iv). The learned trial judge was of the opinion that the partners were entitled to equal shares in the profits. This finding is well supported on the evidence and in law, and should not be interfered with by this Court.

In order to avoid, so far as possible, any further differences between the parties on the reference to the Master it might be desirable to discuss briefly, and dispose of, certain matters which were the subject of discussion on this appeal.

Under the order of the Court that an accounting and winding-up be had of the partnership business, the Master will proceed to establish accounts of the kind which ought to have been kept in the partnership business during the lifetime of the late A. D. Fisher. There will be a capital account for each partner, and the contributions to capital made from time to time by the partners will appear in the respective accounts. The evidence shows that the plaintiffs drew out a comparatively small amount of the profits to which they were entitled from time to time. They allowed the balance of their shares of profits to remain in the business. The Master will ascertain the amount by which such balances of each partner increased their respective contributions to the capital of the business. Where the contributions consist of tangible assets other than money, a valuation will be made by the Master as of the date of such contribution. The Master will, of course, give effect to any agreement between the parties as to the value at which any asset contributed by a partner is taken into the capital of the partnership business. Counsel for the parties agree that in this case the Master will not include in the capital account of any partner an allowance for good will, or for interest on any contribution to capital, or for work done or services furnished by any partner.

*Para. 4 of the judgment at trial, was as follows:

"AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE payment to the plaintiffs of their shares of one-third each in the net assets of the partnership and, subject to paragraph 5 hereof, payment to Margaret B. Fisher as administratrix of the estate of the said A. D. Fisher, deceased, of the remaining one-third share in the net assets of the said partnership."

After payment of debts and liabilities, if any, of the firm to persons who are not partners, the Master will make payment to each partner "rateably" for what is due from the firm to him for advances, as distinguished from capital. In respect of capital, each partner is entitled to be paid "rateably" what is due from the firm to him. "Rateably" means in the proportion which the total of the contributions made by a partner bears to the total contributions of all partners to the capital of the partnership.

After distribution of capital assets, the ultimate residue in this particular case should be divided among the partners in equal shares because on a proper finding on the evidence that is the proportion in which the profits of the business were divisible.

The act of the defendant Margaret B. Fisher in taking over the partnership property and carrying on the partnership business was wrong in law and constituted a tort. She had no right, as against the plaintiffs, either *qua* administratrix of the estate of the late A. D. Fisher or personally, to take over or carry on the partnership business. The plaintiffs are entitled in law to recover any loss caused by reason of such wrongful act.

The right of the plaintiffs on the dissolution of the partnership by reason of the death of the late Mr. Fisher was to have the partnership wound up and its assets, including its good will, sold: *Beatty v. Dickson* (1904), 3 O.W.R. 2, affirmed 5 O.W.R. 568; The Partnership Act, *supra*, s. 39. By reason of the exclusion of the plaintiffs and denial of any interest on their part in the partnership, in fact the denial of the existence of any partnership, the plaintiffs, as surviving partners, were precluded from themselves proceeding with a winding-up, and this action was rendered necessary. Accordingly, if a realization consequent upon the present judgment should realize less than would have been realized had the winding-up proceeded as it should but for the act of the defendant Margaret Fisher, the respondents must have that deficiency recouped to them. In the language of Romilly M.R. in *Mellersh v. Keen* (No. 2) (1860), 28 Beav. 453 at 455, 54 E.R. 440: ". . . the Court is bound to look at it in this point of view:—What it would have produced, if it had been sold in the most advantageous manner and under such circumstances that it would have produced the largest sum for all the

parties." The Master must, accordingly, inquire into this situation and the deficiency, if any, is to be charged in the taking of the accounts to the share of the estate of the late Mr. Fisher in the partnership assets. See *Cragg v. Ford* (1842), 1 Y. & C.C.C. 280 at 284, 62 E.R. 889. This result flows from the right of the respondents, under s. 39 of the Act, "to have the surplus assets . . . applied in payment of what may be due to the partners respectively", rather than from the application of the principle referred to by the learned trial judge from the judgment of Lord Macnaghten in *Dowse et al. v. Gorton et al.*, [1891] A.C. 190. This right arises at dissolution and is in the nature of a lien: Underhill's Law of Partnership, 5th ed., pp. 123-4; *Payne v. Hornby* (1858), 25 Beav. 280 at 286, 53 E.R. 643. The respondents accordingly must receive out of the proceeds of realization, at least the amount which they would have received had the partnership been wound up in due course upon the death of the late Mr. Fisher, and to the extent that the wrongful act of the appellant Margaret Fisher may have prevented that result, the deficiency must be made good out of the share of the late Mr. Fisher in the partnership assets. Had the appellant Margaret Fisher, in carrying on the business as she did, made profits, the respondents would have been entitled to elect to take a share in the profits, or to interest in lieu. Instead of realizing a profit she suffered a loss, and the respondents are accordingly entitled to interest during the period in which they have been deprived of their share by reason of the wrongful act of the appellant Margaret Fisher. See *Lindley on Partnership*, 10th ed., p. 691. This is the principle underlying s. 32(1) of The Partnership Act. In the event that the share of the late Mr. Fisher in the partnership assets should be exhausted by giving effect to these charges against that share, the respondents will be entitled to judgment for any deficiency against the appellant Margaret Fisher personally. The appellant Margaret Fisher, however, carried on the business with the knowledge and consent of the only other next of kin of the deceased partner. The respondents will, therefore, also be entitled by virtue of the right of Margaret Fisher to indemnity against her husband's estate, to be paid the amount of the deficiency out of that estate: *In re Bracey; Hull v. Johns*, [1936] Ch. 690.

I am of the opinion that para. 5 of the judgment of the Court below* should be struck out, and in substitution therefor the judgment should include an appropriate provision for recovery of any loss suffered by the plaintiffs, or either of them, as herein-before described.

It was found by the learned trial judge that the land at Pow Wow Point reconveyed by the defendant Dorothy Alving to the late A. D. Fisher on 7th May 1928, is and forms part of the partnership property and assets. There was evidence upon which this finding could be made, and, notwithstanding the arguments presented by counsel on behalf of the appellants, the finding cannot be disturbed. This question is not open for further controversy or dispute before the Master of the Court.

Counsel for the appellants argues that there is no note or memorandum in writing to evidence the vesting of the land or any interest therein in the partnership, or to show that the late A. D. Fisher held the same in trust. Counsel relies on The Statute of Frauds, R.S.O. 1937, c. 146, s. 4. In my opinion this section is not applicable. The law on the point must be taken to have been correctly stated in *Forster v. Hale* (1800), 5 Ves. 308, 31 E.R. 603. There the Lord Chancellor observed, "The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact, that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence, upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership."

The argument that there was no corroboration of the plaintiffs' claim as required by s. 11 of The Evidence Act, *supra*, must fail. There is ample evidence to establish corroboration of the plaintiffs' claim.

*Para. 5 of the judgment at trial was as follows:

"AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant, Margaret B. Fisher, do pay to the plaintiffs the amount of any loss the plaintiffs may have suffered in the amount of their shares in the net assets of the partnership if it is found in the winding-up of the said partnership business that the sale value of the partnership business has been adversely affected and rendered less in value by the act of the defendant, Margaret B. Fisher, in taking over the partnership property and carrying on the partnership business after the death of the said A. D. Fisher and that the amount of any such loss do constitute a charge in favour of the plaintiffs upon the share of the estate of the said A. D. Fisher in the partnership assets."

It is unnecessary to discuss the argument that the plaintiffs' claim is only for services rendered. The finding that a partnership existed disposes of this ground of appeal. The right of the plaintiffs is to a share of the profits, and a rateable share of capital, as previously discussed, and does not depend upon a claim for services rendered.

It is urged that the costs of all proceedings should be paid out of the assets of the partnership. I do not agree. In my opinion the discretion as to costs vested in the learned trial judge was properly exercised by him. There is no error as to any principle of law in his disposition of the costs, and no injustice has been shown by reason thereof. It is argued that the defendant Dorothy Alving ought not to be held liable for costs, but she disputed the claim of the plaintiffs, and it is sufficient to say that the issues between her and the plaintiffs were of such a character as to make it proper that she should bear the costs of the action, as ordered.

The appellants succeed in this appeal in having the judgment in the court below varied in certain respects, but fail on all other grounds. Success is divided, and I think it would be proper that each party bear its own costs of appeal.

My conclusion and opinion is that the judgment of the Court below ought to be varied in the matters and manner I have indicated, but in all other respects the appeal should be dismissed without costs.

Judgment varied; no costs of appeal.

Solicitors for the plaintiffs, respondents: Erichsen-Brown & Strachan, Toronto.

Solicitors for the defendants, appellants: Clarke, Swabey & McLean, Toronto.

[COURT OF APPEAL.]

Kay v. Kay and Crandon.

Divorce—Bars to Relief—Condonation of Adultery with Named Co-defendant—Right of Plaintiff to Prove other Adultery, with Persons Not Named, as Reviving earlier Misconduct—Rules 775, 776.

A wife sued for divorce, alleging, in her statement of claim, only that the husband had committed adultery with C. in the winter of 1929-30. This adultery was proved, but it was also admitted by the plaintiff that she had condoned it. The plaintiff's counsel then tendered evidence of subsequent adultery committed by the husband with persons unknown. The trial judge refused to admit this evidence, on the ground that such other persons were not named in the statement of claim, as required by Rule 775, and that no order had been obtained, under Rule 776, permitting the plaintiff to proceed without naming them. The action was dismissed, and the plaintiff appealed.

Held, HENDERSON J.A. dissenting, there must be a new trial, since the evidence should have been admitted. The adultery on which the action was founded was that with C., and the other adultery was only collateral, the evidence being given merely to make the earlier adultery available as a ground for relief, notwithstanding the condonation. Condonation, being conditional re-instatement, would be revoked by subsequent misconduct, if established. Rule 775 was inapplicable in these circumstances. *Cramp v. Cramp and Freeman*, [1920] P. 158; *Saunders v. Saunders*, [1897] P. 89, specially referred to.

Per GILLANDERS J.A.: Subsequent misconduct, sufficient to revive condoned adultery, need not itself amount to adultery. The earlier matrimonial offence may be revived by cruelty (*Dent v. Dent* (1865), 4 Sw. & Tr. 105), by an attempt to commit adultery (*Snow v. Snow* (1842), 6 Jur. 285), by improprieties short of adultery, but tending thereto (*Winscom v. Winscom and Plowden* (1864), 10 L.T. 100), by familiarities with a servant (*Ridgway v. Ridgway* (1881), 29 W.R. 612), or by desertion (*Houghton v. Houghton*, [1903] P. 150; *Copsey v. Copsey and Erney*, [1905] P. 94; *Spring v. Spring*, [1926] 2 W.W.R. 78).

AN appeal by the plaintiff from the judgment of Laidlaw J.A., dismissing an action for divorce.

15th February 1944. The appeal was heard by FISHER, HENDERSON and GILLANDERS JJ.A.

G. N. Weekes, for the plaintiff, appellant: The trial judge erred in refusing to admit evidence of the subsequent adultery of the respondent, which revived his adultery with the person named as co-respondent. At the trial the appellant's counsel sought to prove this subsequent adultery in order to show, not primarily another adultery entitling the appellant to a divorce, but a revival of the adultery alleged in the statement of claim. Condonation is a defence, and a subsequent matrimonial offence, even less than adultery, is an answer to evidence of condonation, and not a substantive allegation requiring to be set out in the statement of claim: *Houghton v. Houghton*, 72 L.J.P. 31, [1903] P. 150; *Winscom v. Winscom and Plowden* (1864), 10 L.T. 100,

3 Sw. & Tr. 380, 164 E.R. 1322; *Dent v. Dent* (1865), 34 L.J.P. 118, 4 Sw. & Tr. 105, 164 E.R. 1455.

There is a full discussion of the doctrine of condonation and revival in *Cramp v. Cramp and Freeman*, [1920] P. 158, and in *Moore v. Moore*, [1892] P. 382. It is not necessary in a case such as this for the plaintiff to plead condonation and revival. The defendant must plead all matters which he relies upon as a defence: Rule 143; Holmested and Langton, Ontario Judicature Act, 5th ed., at p. 708. The appellant asks that such judgment shall be pronounced by this Court as should have been pronounced at the trial had the evidence so refused been admitted.

Cur. adv. vult.

16th March 1944. FISHER J.A.: This appeal by the plaintiff from the judgment of Laidlaw J.A. arises out of an action by the plaintiff against her husband for divorce. The action was tried at Stratford and dismissed. The parties to the action were married in December 1925, and separated in April 1933. Prior to the separation the defendant admitted that he had committed adultery and the plaintiff has admitted that she condoned the adultery.

The plaintiff alleges that subsequent to the condonation her husband again committed adultery, and at the trial she tendered evidence to prove the subsequent adultery for the purpose of reviving and wiping out the condonation of adultery, but the learned judge refused to admit such evidence, and this appeal followed.

The objections raised by the trial judge to the admission of the evidence were that no order was obtained in the action for joining any defendants whose names were unknown; that the plaintiff was confined to the charge respecting Evelyn Crandon only, and that to bring any other unknown persons not before the Court would mean that such persons, if they desired to appear, would have no opportunity to defend themselves.

With respect, I am of opinion the trial judge was wrong in refusing to admit the evidence. The divorce Rules require that every person with whom it is alleged that adultery has been committed shall be made a party defendant unless an order dispensing with such joinder is made. Clearly that Rule only contemplates this joinder of persons as defendants who are

parties to the adultery which is the cause or part of the cause upon which the action is founded.

The subsequent adultery attempted to be proved here is not part of the cause of action, and no relief is claimed in respect thereof. It is only evidence to show that condonation, which is forgiveness conditioned upon continued subsequent good behaviour, had been revoked by the breach of that condition. The adultery which is the cause of action is that revived by the subsequent misconduct, and the person with whom that adultery was committed has been named. The requirements of the Rule have been complied with, and the failure to add as defendant the person with whom the subsequent adultery was committed, or to obtain an order dispensing with her joinder, is not a good ground for excluding the evidence which is only collateral to the real cause of action.

My conclusion is that the plaintiff was entitled to tender evidence of the subsequent adultery, and if that fact was proved to the satisfaction of the trial judge, the prior adultery would be revived and the plaintiff would be entitled to the usual decree.

I would therefore allow the appeal and direct a new trial.

HENDERSON J.A.: An appeal from the judgment of the Honourable Mr. Justice Laidlaw, dated 25th October 1943, dismissing this action without costs.

Counsel referred to: *Dent v. Dent* (1865), 34 L.J.P.M.A. 118, 4 Sw. & Tr. 105, 164 E.R. 1455; *Houghton v. Houghton*, 72 L.J. P.D. & S. 31, [1903] P. 150; *Winscom v. Winscom and Plowden* (1864), 10 L.T. 100, 3 Sw. & Tr. 380, 164 E.R. 1322; *Cramp v. Cramp and Freeman*, [1920] P. 158.

On examination these cases do not support the appeal; but see *Rayden on Divorce*, 4th ed., p. 136, para. 30, where the author says:

"Condonation of a wife's adultery with one man is not cancelled, as regards that man, by her subsequent adultery with another man"; and see the cases cited in the notes to this statement.

The appeal is therefore dismissed without costs.

GILLANDERS J.A.: An appeal by the plaintiff from the dismissal of her action for divorce.

She brought action against her husband and the co-respondent alleging adultery in the winter of 1929-30. In the course

of the trial the plaintiff stated that her husband had admitted to her that he had committed adultery with the co-respondent while the co-respondent was employed as a domestic in the home. The plaintiff, however, still continued to live with him. It was only when "he continued to run around with other women and when he admitted to me that he had committed adultery with another woman after that that I could stand no more and I left him." The plaintiff also called the defendant husband as a witness at the trial. In the course of his testimony he admitted the adultery alleged in the pleadings with the co-respondent. He denied any misconduct with her after she left his employment.

Plaintiff's counsel sought to introduce evidence of the husband to show his subsequent adultery with others. It was urged that this evidence was admissible for the purpose of getting over the condonation and reviving the original adultery alleged in the pleadings. It was admitted that there was no subsequent adultery with the co-respondent, and that the person or persons with whom the later adultery took place were not defendants in the action, and that no order had been obtained in pursuance of Rule 776.

The learned trial judge held that, applying Rules 775 and 776, such evidence could not be received, and he dismissed the action.

Counsel for the plaintiff appellant urges that the action as laid was properly framed, that it was not necessary to plead the subsequent adultery as a substantive allegation and that the evidence of subsequent adultery with another or others should have been received to set aside the condonation and revive the adultery that was pleaded. Condonation is not pleaded in the statement of defence, but it is admitted that the Court was right in taking notice of it, when established at the trial: *Statham v. Statham*, [1929] P. 131.

I have found no authority decisive of the point here in issue.

Condonation as applied to matrimonial offences, though frequently defined as conditional forgiveness, is exhaustively discussed by McCardie J. in *Cramp v. Cramp and Freeman*, [1920] P. 158, where he points out that it is not forgiveness in the ordinary sense, but would be more properly defined as conditional reinstatement. It has been held in various cases that condoned adultery may be revived by a subsequent misconduct.

The subsequent misconduct need not amount to adultery. It may be satisfied by subsequent cruelty: *vide Dent v. Dent* (1865), 34 L.J.P.M.A. 118, 4 Sw. & Tr. 105, 164 E.R. 1455; an attempt to commit adultery: *Snow v. Snow* (1842), 6 Jur. 285; or subsequent misconduct and improprieties short of, but tending to, adultery: *Winscom v. Winscom and Plowden* (1864), 10 L.T. 100, 3 Sw. & Tr. 380, 164 E.R. 1322; familiarities with a servant: *Ridgway v. Ridgway* (1881), 29 W.R. 612; or desertion: *Houghton v. Houghton*, 72 L.J.P.D. & S. 31, [1903] P. 150; *Copsey v. Copsey and Erney*, [1905] P. 94; *Spring v. Spring*, [1926] 2 W.W.R. 78, [1926] 2 D.L.R. 893.

In *Saunders v. Saunders*, [1897] P. 89, the Court of Appeal was considering an application under The Matrimonial Causes Act, 1857 (Imp.), c. 85, to excuse the petitioner from making the alleged adulterer a co-respondent to the petition. Lindley L.J., in the course of his judgment, considered that under the statute and divorce rules there under consideration the "alleged adulterer" meant the adulterer alleged by the petitioner in his petition. In this case the only adultery on which a decree *nisi* could be based is that alleged in the statement of claim with the named co-respondent. No relief is sought against any one, nor is any one bound, who is not a party to the action.

I incline to the view that the provision of Rule 775 respecting "every person with whom adultery is alleged" has reference to the pleadings. In this case the plaintiff has alleged adultery in the statement of claim, and has joined the person involved in the allegation so made. Having done so, she tenders evidence at the trial to prove the allegations so made, and to obtain the relief she seeks. I think the Rule does not extend to other persons who might have been mentioned in the giving of relevant evidence to establish the allegations made in the pleadings and to make them available as a basis on which a decree *nisi* might be made.

It might be thought that to permit evidence to be given aimed at showing adultery with some one not a party to the action (in the absence of an order under Rule 776) would be defeating an object of the Rule, which is to give every person involved in an allegation of such misconduct notice and an opportunity to defend. If the Rule is intended to include persons in the class here in question it should be specific. The evidence might in the opinion of the Court not establish subsequent

adultery, but might still establish misconduct sufficient to revive the original adultery as pleaded. I agree with the view expressed by my brother Fisher that the evidence is admissible. It may then be considered whether or not it is sufficient to revive the original adultery alleged, if this is established.

The appeal should be allowed and a new trial directed.

New trial ordered, HENDERSON J.A. dissenting.

Solicitors for the plaintiff, appellant, G. N. Weekes & Sons, London.

[COURT OF APPEAL.]

Andre v. Valade.

Limitation of Actions—Action upon Mortgage—Right “accruing due”—Effect of Acceleration Clause—Special Rules as between Husband and Wife—The Limitations Act, R.S.O. 1937, c. 118, ss. 4, 15, 23(1), 48.

Where a mortgage contains an acceleration clause providing that the principal shall become due on default in payment of interest, a right to claim repayment of the principal, foreclosure, possession, and other relief, accrues upon the first default in payment of interest, and the Statute of Limitations will accordingly commence to run from that time. It makes no difference that the acceleration clause contains the words “at the option of the mortgagee”, and that the mortgagee has not in fact exercised the option on the first default. *King et al. v. Flanigan*, [1944] O.W.N. 105, approved; *North American Life Assurance Co. v. Johnson*, [1940] O.R. 522, distinguished; *Hemp v. Garland* (1843), 4 Q.B. 519; *Reeves v. Butcher*, [1891] 2 Q.B. 509, applied.

Where the mortgagor and mortgagee are husband and wife respectively, and are living together in amity, and no payments of interest are made on the mortgage, the presumption is that moneys which might otherwise have been paid as interest on the mortgage have been expended, with the consent and approval of the wife mortgagee, for the joint benefit of the parties and their household. If there is no evidence to displace this presumption, the interest payments will not be recoverable, but the statute will not run against the wife, so as to bar a claim for principal, during the joint lives of the parties. *In re Hawes; Burchell v. Hawes* (1892), 62 L.J. Ch. 463; *Re Dixon; Heynes v. Dixon* (1900), 83 L.T. 129; *Ellis v. Ellis* (1913), 5 O.W.N. 561, applied.

AN appeal by the defendant from the judgment of McFarland J. in favour of the plaintiff in an action for foreclosure of a mortgage, judgment on the covenant, and other relief. The facts are fully stated in the reasons for judgment of GILLANDERS J.A.

14th February 1944. The appeal was heard by FISHER, HENDERSON and GILLANDERS J.J.A.

C. J. McDougall, for the defendant, appellant: The trial judge erred in holding that the action was not barred by the provisions of The Limitations Act, R.S.O. 1937, c. 118. The mortgagor defaulted in the payment of interest on 20th April 1928, thereby breaking the condition by which the mortgage was to become void. At that moment the mortgagee was entitled to bring foreclosure proceedings: *Thomson v. Willson* (1915), 51 S.C.R. 307 at 315, 23 D.L.R. 468. The Act bars such an action ten years after the date of default. Furthermore, the mortgage contained an acceleration clause by virtue of which a cause of action arose in favour of the mortgagee when default first occurred, namely, on 21st April 1928, and consequently the action was barred at the end of ten years from that date.

Whether or not the words "at the option of the mortgagee" appear in the acceleration clause, the meaning is the same, as without these special words it was always an optional right which the mortgagee need not exercise; otherwise the mortgagor by his own default could take advantage of such default by paying the whole principal sum even against the wish of the mortgagee: *Hemp v. Garland* (1843), 4 Q.B. 519; *McFadden v. Brandon* (1904), 8 O.L.R. 610; *Virtue v. Marshall* (1924), 26 O.W.N. 2; *Cameron v. Smith* (1913), 4 O.W.N. 1459, 24 O.W.R. 767, 12 D.L.R. 64. [GILLANDERS J.A.: The case of *Reeves v. Butcher*, [1891] 2 Q.B. 509, approaches closely to the one at bar.] Regardless of the special clauses contained in the mortgage, the Statute of Limitations would run from the day after the first default in payment of interest. It has been frequently stated that where the payment of principal under a mortgage is postponed, the principal bearing interest in the meantime at a definite rate per annum, or as the case may be, it is an implied term of the postponement of principal payment that such postponement is conditional on the punctual payment of the interest: *Seaton v. Twyford* (1870), L.R. 11 Eq. 591 at 598. The point of commencement of the period of limitation is at the time when the respondent could first have brought the action and proved sufficient facts to sustain it: *Bradford Old Bank, Limited v. Sutcliffe*, [1918] 2 K.B. 833 at 848.

D. A. Macdonald, K.C., for the plaintiff, respondent: The Statute of Limitations, in case of a contingency, runs from the happening of the contingency: *Fenton v. Emblers* (1762), 3 Burr 1279, 97 E.R. 831; *North American Life Assurance Co. v.*

Johnson; Linton v. Johnson, [1940] O.R. 522, [1940] 4 D.L.R. 496; *Re Gould; Ex parte Garvey*, [1940] O.R. 250, [1940] 3 D.L.R. 12. The mortgagee did not exercise the option contained in the mortgage until this action was brought. The mortgage itself must be carefully examined, and the words "at the option of the mortgagee" should be given their full value. The mortgagor would not be permitted to take advantage of his own default.

Our contention is that the mortgagor was not in default so long as he and his wife were living together on amicable terms: *In re Hawes; Burchell v. Hawes* (1892), 62 L.J. Ch. 463; *Re Dixon; Heynes v. Dixon* (1900), 83 L.T. 129. The case of *Bradford Old Bank, Limited v. Sutcliffe*, [1918] 2 K.B. 833 makes it clear that everything depends on the wording of the document. The Statute of Limitations did not become operative until after the death of Mrs. Valade. The pleadings disclose that no payment was made on the mortgage. There was never any question of implication of payment between the husband and wife and therefore the decision in the *Burchell* case, *supra*, is not applicable.

The parties to a mortgage may make exceptions or qualifications to clauses mentioned in The Short Forms of Mortgages Act, R.S.O. 1937, c. 160, s. 3: *Schwartz v. Williams* (1915), 35 O.L.R. 33, 27 D.L.R. 733.

In the present case, time under the statute could not in any event commence to run before 20th April 1937, or before the mortgagee exercised her option, whichever happened first. Here, the statute did not actually begin to run until 20th April 1937. The limitation period for an action on a mortgage covenant is ten years, and this action is therefore not barred.

C. J. McDougall in reply.

Cur. adv. vult.

24th March 1944. FISHER J.A.:—I agree in the result.

HENDERSON J.A.:—I have had the privilege of reading the opinion of my brother Gillanders herein.

I agree that the judgments in *North American Life Assurance Co. v. Johnson; Linton v. Johnson*, [1940] O.R. 522, [1940] 4 D.L.R. 496, both of the Chief Justice of the High Court and of the Court of Appeal, pronounced by McTague J.A., do not govern this case for the reasons stated by my brother Gillanders.

The question of the application of the Statute of Limitations in the case at bar, depends entirely upon the wording of s. 23(1) of The Limitations Act, R.S.O. 1937, c. 118, and it is clear to me from this wording that the statute begins to run as soon as "a present right to receive the same accrued to some person capable of giving a discharge for, or release of the same."

In the result the Statute of Limitations applies to this case, but for the reasons given by my brother Gillanders, I agree in the result reached by him.

GILLANDERS J.A.:—The defendant appellant was the husband of Aurore Andre Valade, deceased. The deceased had been married before to one Stephen Andre, who died leaving his widow and several infant children him surviving.

Some few years after the marriage of the widow and the appellant a farm property which had been owned by the deceased Stephen Andre, and had passed on his death to his widow and children, was conveyed to the appellant. The conveyance, made with the consent of the Official Guardian on behalf of the infant children, was in consideration of \$6,100.

The appellant executed a mortgage to the Accountant of the Supreme Court for the sum of \$2,094.54, to secure the shares of the infant children of the deceased Andre, and a second mortgage for \$3,000 to his wife Aurore Valade to secure her interest in the property. This conveyance was in March 1927. The interest of the children, secured by the mortgage to the Accountant of the Supreme Court, has been paid, and that mortgage is not now an encumbrance on the property.

It is common ground that no actual payments of interest or principal were ever made by the appellant on the mortgage given to his wife to secure her interest in the property.

After the wife's death, this action was brought on the mortgage, by writ issued on 5th July 1943, by her executor, a son by her first marriage, claiming payment, possession and foreclosure. The action succeeded at the trial, and the mortgagor now appeals.

The only point in issue in the appeal is whether or not the Statute of Limitations provides a defence to the action.

The mortgage in question is dated 20th April 1927. The provision for payment therein is as follows:

"PROVIDED this mortgage to be void on payment of Three thousand dollars of lawful money of Canada, with interest (to be computed from the 20th day of April A.D. 1927) at 5 per cent. per annum as follows: The said principal sum of \$3000.00 shall become due and payable on the 20th day of April 1937 and interest yearly at the said rate as well after as before maturity and both before and after default on such portion of the principal as remains from time to time unpaid on the twentieth days of April and in each year until the principal is fully paid; the first payment of interest to be computed from the 20th day of April 1927 upon the whole amount of principal hereby secured to become due and payable on the twentieth day of April next 1928, and taxes and performance of statute labor, and performance of all the other provisions of this mortgage."

The mortgage also contains, *inter alia*, the following provision:

"Provided that in default of the payment of the interest (or any part of the principal) hereby secured the principal hereby secured shall (at the option of the mortgagee), become payable forthwith."

The appellant contends that no payments of either interest or principal having been made, the action is now barred by reason of The Limitations Act, R.S.O. 1937, c. 118, ss. 4, 15 and 48.

It is urged that the statute commenced to run from the first default in payment of interest, on 20th April 1928. It was urged that, apart from the provisions of the acceleration clause, when default was made in the payment of interest, the right to bring this action arose in respect not only of interest but also of the principal moneys, but in any event it is urged that the provisions of the acceleration clause make this result clear.

For the respondent it is urged that by the express provisions of the mortgage as contained in the acceleration clause, the principal moneys only became payable "at the option of the mortgagee", and that while it is true that this option might have been exercised, in fact it never was. It is argued that, the option not having been exercised, the principal did not fall due until the mortgage matured in 1937, with the result that the statute did not commence to run against any claim for principal moneys till that time, and so this action is not now barred by the statute.

Various cases were cited and discussed on the argument.
North American Life Assurance Co. v. Johnson; Linton v. John-

son, [1940] O.R. 522, [1940] 4 D.L.R. 496, was an action brought by a mortgagee against the purchaser of the equity of redemption in the mortgaged premises. The application of the Statute of Limitations to the rights of the parties in that case depended on whether or not the original mortgagor, the vendor of the equity of redemption, had lost his right to compel payment of the mortgage moneys against the purchaser of the equity of redemption. The mortgage contained a provision that upon default of payment of interest the principal should become payable "at the option of the mortgagee", and that upon default of payment of instalments of principal promptly as they matured, the balance of the principal and interest should immediately become due and payable "at the option of the mortgagee".

In the course of his judgment at the trial, Rose C.J.H.C. observes, at p. 529:

"If the question were whether the mortgagees' time for enforcing payment of the whole principal had been running for more than six years before the commencement of the actions, the argument might have been formidable; because the mortgagees, if they had chosen to do so, could more than six years before the commencement of the actions have maintained an action for the whole of the principal moneys."

He then proceeds to point out that the question with which the Court was concerned there was whether the assignor of the equity of redemption had, at the time the action was commenced, lost his right to compel his assignee to pay the mortgage moneys.

Affirming the judgment of the Chief Justice in the Court of Appeal, McTague J.A. says, at p. 542:

"As the learned Chief Justice has pointed out, the latter contention is based upon the assumption that as soon as there was any default in payment of principal McGillivray's right to compel Johnson to pay the whole of the principal became enforceable. The terms of the respective mortgages dispose of such an assumption, because both contained acceleration clauses providing that on default of payment of interest the whole of the principal shall become payable *at the option of the mortgagee*. But the mortgagees did not exercise the option until these actions were commenced, and therefore McGillivray had not lost his right of action to compel Johnson to pay."

It is apparent that the above case should be distinguished from the case at bar.

After the first default in the payment of interest, according to the provisions of the mortgage itself, this action might have been brought by the mortgagee for all the relief claimed in the present action.

The precise point here in question arose in the recent case of *King et al. v. Flanigan*, [1944] O.W.N. 105, where Barlow J. held that failure by a mortgagee to exercise a similar option did not postpone the time when the statute started to run. In that case he refers to *Hemp v. Garland* (1843), 4 Q.B. 519, 114 E.R. 994, where Lord Denman C.J. said in part:

"In this case there was a default more than six years ago; and upon that the plaintiff might, if he pleased, have signed judgment and issued execution for all that remained due, or he might have maintained his action. If he chose to wait till all the instalments became due, no doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time that the plaintiff had a right to maintain it. The Statute of Limitations runs from the time the plaintiff might have brought his action, unless he was subject to any of the disabilities specified in the statute; and, as the plaintiff might have brought his action upon the first default, if he did not choose to enter up judgment, we think that the defendant is entitled to the verdict upon the plea of the Statute of Limitations." This case was applied and followed in *Reeves v. Butcher*, [1891] 2 Q.B. 509.

In the case at bar a cause of action for all the relief now claimed arose and was available to the mortgagee upon the first default in the payment of interest. The exercise of that right was optional, but the fact that it was not exercised did not affect her right.

Respondent submits, however, that in any event it should be held that the Statute of Limitations did not run in favour of the appellant mortgagor during the joint lives of himself and his deceased wife, the mortgagee. In support of this submission counsel cites *In re Hawes; Burchell v. Hawes* (1892), 62 L.J. Ch. 463, and *Re Dixon; Heynes v. Dixon*, [1900] 2 Ch. 561, 83 L.T. 129.

In *Burchell v. Hawes* there was considerable evidence of a course of dealing between the parties, the keeping of a common purse for husband and wife, and in addition the fact that they lived together in amity. Kekewich J. held "that the hand to receive and the hand to pay being the same, and the husband and wife having lived together in perfect amity, the mortgage must be treated as still subsisting."

In *Re Dixon; Heynes v. Dixon, supra*, there was a marriage settlement in the hands of trustees. The income was payable to the wife for life for her separate use and after death to her husband. The trustees, on the written request of the wife, in 1852, advanced trust funds to the husband on the security of his bond. The wife died in 1876 and the husband in 1896, without having repaid the advance or made any interest payments thereon. Later this action was brought by the trustees of the settlement against the husband's estate. Dealing with the point here in question, Lord Alvertstone M.R. says in part, at p. 133 (L.T.):

"It seems clearly established on the authorities that, whether you regard it as a receipt of interest or a receipt of the wife's income, so long as the husband and wife live together, the form need not be gone through of handing the money from the one to the other. . . . I think the effect of the principle which has been acted upon in many cases in courts of equity is that, if husband and wife are living together under circumstances where the wife's income is being received and dealt with by the husband (as it was in this case), the statute does not run."

Rigby L.J., in the same case, says, at p. 135: "Now, in equity, when a wife living in amity with her husband allows him to retain money which she might have insisted on having paid to her for her separate use, she is assumed to have given to him all arrears of income. *Caton v. Rideout* (1849), 1 Mac. & G. 599, 41 E.R. 1397, is frequently cited as the authority for this proposition, but it only recognised and did not lay down for the first time the doctrine on which the court proceeds."

In *Ellis v. Ellis* (1913), 5 O.W.N. 561, 25 O.W.R. 539, 15 D.L.R. 100, which was an action brought by a wife for the recovery of goods alleged to have been tendered by her husband, and for an accounting of moneys of the wife received by the husband, Mulock C.J. Ex., as he then was, says, at p. 563:

"The rule applicable to such a case is thus stated in *Alexander v. Barnhill*, 21 L.R. Ir. at p. 515; 'There is a great difference between the receipt of the income of a wife's separate property by her husband and of the corpus. In the latter case, the onus of proof of a gift by the wife to the husband lies upon him, and must be clearly established, or else the husband will be held to be a trustee for his wife. In the former, the onus lies on the wife, save perhaps as to the last year's income, and she must establish clearly and conclusively that her husband received her income by way of a loan'".

In the case at bar it should be kept in mind that the appellant, by the execution of the mortgage under seal, acknowledged his indebtedness to his wife for the sum secured by the mortgage, and gave his covenant for the payment of principal and interest thereon. He contends he never made any payment on the mortgage and that his wife "always said she would never ask me for the mortgage." He says his wife assisted him by doing the ordinary work of a farmer's wife, and in that way helped in paying off prior mortgages. His wife apparently brought to the home her six children by her prior marriage. They were raised there and assisted with the farm work. The husband and wife lived in amity, with the possible exception of little disputes.

What conclusion should be drawn respecting the payments of interest which fell due on the mortgage while the husband and wife were living together in harmony under these circumstances? Applying the principle discussed in the cases cited, I hold the view that although no actual payments were made to the wife, the presumption is that the moneys which might otherwise have been paid as interest on the mortgage were expended for the joint benefit of the husband and wife and their household, with the wife's consent and approval. There is no evidence to displace this presumption. The Statute of Limitations did not run against the wife while these circumstances existed.

In the result, therefore, while the respondent is not entitled to recover any payments of interest which fell due during the wife's lifetime, the Statute of Limitations does not provide a defence in so far as the principal moneys and interest accruing due thereon since the wife's death are concerned, nor to a claim to possession and foreclosure in respect thereof. The respondent should therefore have judgment accordingly with costs of the

action. Success in this Court being divided, there should be no costs of the appeal.

Trial judgment varied.

Solicitors for the plaintiff, respondent: Macdonell & Macdonald, Alexandria.

Solicitors for the defendant, appellant: Brennan & McDougall, Cornwall.

[COURT OF APPEAL.]

Rae v. Rae.

Divorce and Matrimonial Causes—Nullity of Marriage—Impotence—Necessity for Showing that Obstacle, whether Physical or Mental, Permanent and Incurable.

It is reasonably expected that at the time of a marriage both parties are able and willing to consummate it, and if either of the parties is impotent at that time the Court may pronounce a decree declaring the marriage null and void. Impotence or incapacity must exist at the time of marriage, and must be such as to render sexual intercourse impracticable. The impracticability may arise either by reason of some structural defect or from some mental or moral disability. Whatever its source, the incapacity creating the practical impossibility of sexual intercourse must be incurable. If there is a possibility, even though it is not a probability, of curing the condition, the Court will not annul the marriage, and there is no distinction in this respect between a physical and a mental obstacle to consummation. *G—v. G—* (1871), L.R. 2 P. & D. 287; *G. v. G.*, [1924] A.C. 349, and other authorities, reviewed.

The practice and the substantive law of the ecclesiastical courts are applicable in an action in the Supreme Court of Ontario for a declaration of nullity. *Bethell v. Bethell*, [1932] O.R. 300 at 303, [1932] 2 D.L.R. 663, referred to.

AN appeal by the plaintiff from the judgment of Urquhart J. The action was by a husband for a declaration that the marriage solemnized between him and the defendant was a nullity. The following statement of facts is taken from the judgment of LAIDLAW J.A.:

"The parties were married in Toronto on 12th July 1938. They lived together for about two years after the marriage, and then lived apart for a week. Subsequently they resumed occasional cohabitation for about two months, and then finally separated.

"The plaintiff says that the marriage has never been consummated; that the defendant has persistently refused to consummate the marriage, and that such refusal is due to some malformation or abnormal physical or mental condition, which

existed before the marriage and has continued to exist and presently exists.

"The defendant pleads that she is physically capable of consummation, denies that she persistently refused to consummate the marriage, and says that the marriage has been duly consummated.

"The learned trial judge makes these findings: (1) both parties were normal and capable of intercourse; (2) real intercourse has not taken place; (3) 'intercourse could have been easily managed if the parties had gone about it in the right way', and (4) the defendant had no repugnance."

9th March 1944. The appeal was heard by RIDDELL, HENDERSON and LAIDLAW J.J.A.

G. Beaudoin, for the plaintiff, appellant: On the evidence, and the trial judge's findings of fact, the plaintiff was entitled to relief. It was found that the defendant had not refused to consummate the marriage, but had attempted to co-operate. That indicated that there must be an inability or incapacity—some subconscious repugnance to the act of intercourse. There was a practical impossibility, which must have been caused by something. I rely on *Heil v. Heil*, [1942] S.C.R. 160, [1942] 1 D.L.R. 657; *G. v. G.*, [1924] A.C. 349, particularly at p. 353; *F. v. P. (falsely called F.)* (1896), 75 L.T. 192; *G— v. G—* (1871), L.R. 2 P. & D. 287. There is nothing in the evidence to support the trial judge's statement that the parties did not know "how to go about it".

J. K. Brower, for the defendant, respondent: The trial judge was wrong in finding that the marriage had not been consummated. Even accepting that finding, however, the action was properly dismissed. The mere fact of non-consummation is not enough, and there is nothing further established by the evidence. [HENDERSON J.A.: Surely it is amply proved that there were attempts at consummation, with the wife co-operating.] There is a heavy onus on the plaintiff, and he must establish the reason for the non-consummation. [HENDERSON J.A.: Is it not for the Court to ascertain what the reason was?] As to onus, I rely on *W. v. W.*, [1940] O.W.N. 171, [1940] 2 D.L.R. 491 (*sub nom. Wolfe v. Wolfe*). [LAIDLAW J.A.: If you accept the fact that there was no consummation, and the further fact that there was

no physical incapacity, what explanation is there except a mental incapacity?] The husband's ignorance.

As to the doctor's evidence, it is to be remembered that their examinations were made between two and three years after the parties separated.

The plaintiff must conclusively establish an invincible repugnance: *Bethell v. Bethell*, [1932] O.R. 300, [1932] 2 D.L.R. 663. Not only that, but it must be incurable, and the evidence here indicates the reverse: *Tice v. Tice*, [1937] O.R. 233, [1937] 1 D.L.R. 660, affirmed [1937] O.W.N. 250, [1937] 2 D.L.R. 591. Mere temporary nervous ignorance is not sufficient.

I refer also to *K. v. K.*, [1923] 3 W.W.R. 22, [1923] 3 D.L.R. 485; *G. v. G.*, [1924] A.C. 349 at 355.

G. Beaudoin, in reply.

Cur. adv. vult.

29th March 1944. RIDDELL J.A.:—This is an appeal from the judgment of Mr. Justice Urquhart, dismissing an action for a declaration voiding the marriage of the parties on the ground of sexual incapacity of the defendant wife.

Giving full effect to the oft-declared desire of the Court to place the husband in a position to gratify the natural desire placed in his frame by his Creator, I can find nothing in the evidence to prove that he is deprived of it, and applying the law as laid down in the cases considered by my brother Laidlaw, I can find nothing to justify us in allowing this appeal.

I would dismiss the appeal with costs here and below.

HENDERSON J.A. (*dissenting*):—An appeal by the plaintiff from the judgment of Urquhart J., dated 25th January 1944, dismissing the action for a declaration that the marriage is null and void. The facts are stated in the reasons of my brother Laidlaw.

The learned trial judge found that the marriage had not been consummated, this after four years of effort on the part of the plaintiff, whose potency is not questioned, with such aid and co-operation as the defendant, with the best intentions, was able to give. The finding of the learned trial judge that "intercourse could have been easily managed if the parties had gone about it in the right way" cannot therefore be supported. I had occasion to consider the point in question in my dissenting opinion in this Court in the case of *Heil v. Heil*, [1939] O.W.N. 524, [1939] 4

D.L.R. 402, which was sustained in the Supreme Court of Canada, [1942] S.C.R. 160, [1942] 1 D.L.R. 657. In my opinion this case is governed by that decision, and the appeal must be allowed and a declaration of nullity made as prayed.

LAIDLAW J.A. [after stating the facts as above]:—Jurisdiction of the Supreme Court of Ontario to annul a marriage is contained in The Divorce Act (Ontario), 1930 (Dom.), c. 14. The provisions of this statute were enacted in the Province of Ontario, deemed to have force since 30th May 1930: The Marriage Act, 1933 (Ont.), c. 29; R.S.O. 1937, c. 207, s. 35. The law in force in Ontario is the law of England as it existed on the 15th day of July 1870. The Matrimonial Causes Act of 1857 (20-21 Vict., c. 85), together with certain amendments thereto which need not now be noted, is thus made applicable. By s. 22 thereof, the Court is required to act on the principles of the ecclesiastical courts. “ . . . the practice and as well the substantive law administered by the ecclesiastical courts are to be our guide in actions of nullity”: per Hodgins J.A. in *Bethell v. Bethell*, [1932] O.R. 300 at 303, [1932] 2 D.L.R. 663.

A marriage ought not to be lightly interfered with, but on the contrary the Court ought to be fully satisfied that the grounds advanced by a petitioner are sufficient to justify the termination of the relationship of the parties. In my opinion it is not in the best interest of public morals and social welfare that the burden of proof necessary in law to end the solemn vows and undertakings of married persons should be discharged with any degree of ease.

It is reasonably expected and assumed that at the time of marriage both parties are capable and willing to consummate it. But if either of the parties be impotent at that time, the Court may pronounce a decree declaring it null and void: *B—n v. M—e* (*falsely calling herself B—n*) (1852), 2 Rob. Eccl. 580, 163 E.R. 1420; Latey on Divorce, 12th ed., p. 176. Impotence or incapacity must exist at the time of marriage: *Napier v. Napier* (*otherwise Goodban*), [1915] P. 184 at 190, per Pickford L.J. The incapacity must be such as to render complete sexual intercourse impracticable: *D—e v. A—g* (*falsely calling herself D—e*) (1845), 1 Rob. Eccl. 279 at 299, per Dr. Lushington, 163 E.R. 1039; *Snowman* (*otherwise Bensinger*) *v. Snowman*, [1934] P. 186. The basis of the Court’s interference is the impracticability of con-

summation: *G— v. G—* (1871), L.R. 2 P. & D. 287 at 291. The impracticability may arise by reason of some structural defect or from some mental or moral disability: *H. v. P., falsely called H.* (1873), L.R. 3 P. & D. 126; *G— v. G—, supra;* *J. (otherwise K.) v. J.* (1908), 24 T.L.R. 622; *G. v. G.*, [1924] A.C. 349. But the incapacity creating the practical impossibility of sexual intercourse must be an incurable one. "When there is a probability of capacity the Court cannot separate parties": *Welde v. Welde* (1731), 2 Lee 580, 161 E.R. 447. In *Brown v. Brown* (1828), 1 Hag. Ecc. 523, 162 E.R. 665, Sir John Nicholl said, at p. 524: ". . . here there is a failure of proof on both the points which it was incumbent on the husband to establish: first, that there was an impediment to consummation, existing at the time of the marriage; and secondly, that this impediment was incurable." In *Stagg v. Edgecombe* (1863), 3 Sw. & Tr. 240, 32 L.J.P. 153, 164 E.R. 1266, it was held that if the impotency charged is alleged to arise from physical incapacity, and there is a possibility of curing it, even though improbable, the Court will not annul the marriage. It was said by the Judge Ordinary: "Here I have no right to assume that the incapacity will be permanent". Dr. Lushington in the Consistory Court of London said: "If there be a reasonable probability that the lady can be made capable of a *vera copula* . . . I cannot pronounce this marriage void." *D—e v. A—g (falsely calling herself D—e), supra*, at p. 299, referred to by Hogg J. in *Tice v. Tice*, [1937] O.R. 233 at 238, [1937] 1 D.L.R. 660, affirmed [1937] O.W.N. 250, [1937] 2 D.L.R. 591. See also Latey on Divorce, 12th ed., p. 179.

In *G— v. G—* (1871), L.R. 2 P. & D. 287 at 291, it was made plain that remedies had been tried "under conditions as favourable as it can be expected that they will ever be tried." The Judge Ordinary concluded: "I see nothing in the evidence tending to shew that if they were to resume cohabitation to-morrow there would be any difference in the state of things that has existed for the two years and ten months of the previous cohabitation."

In *G. v. G.*, [1924] A.C. 349, Lord Shaw of Dunfermline, at pp. 369-370, said: ". . . in deciding this case affirming incapacity, I do so on the ground that the lady was afflicted with a repulsion . . . so ineradicable and so invincible, as can only be explained by incapacity."

While judgments in cases where a decree of nullity has been granted do not always state expressly that the practical impossibility of consummation is a permanent and incurable impediment, nevertheless evidence to support such a finding forms the basis of the decisions. It may be pointed out, however, that it is sufficient, though the defect be possibly or probably curable, to show that the defective person refuses to submit to the treatment necessary for cure, even though the operation be slight: *L. v. L., falsely called W.* (1882), 7 P.D. 16; *Rayden on Divorce*, 4th ed., p. 64. No difference can properly be made, in the application of principles of law, between cases of physical incapacity and cases of mental or moral incapacity. In either case the Court must be satisfied that the impediment to consummation cannot be overcome. Moreover, the presumption in favour of the validity of a marriage can be overcome only by convincing evidence: *W. v. W.*, [1940] O.W.N. 171, [1940] 2 D.L.R. 491 (*sub nom. Wolfe v. Wolfe*). The petitioner must remove all reasonable doubt: per Lord Birkenhead L.C. in *C. (otherwise H.) v. C.*, [1921] P. 399, quoting *U. (falsely called J.) v. J.* (1867), L.R. 1 P. & D. 460 at 461-2.

I examine the evidence in the light of the principles of law above discussed. Both parties are normal and physically capable of consummating the marriage. Both parties have been willing to do so. The wife did not refuse advances made by her husband and did not refuse to engage in the act of intercourse. On the contrary, according to the evidence of her husband, she submitted herself to him. The learned trial judge has found that there is no repugnance on her part. This finding is amply supported by evidence. Moreover it is found that "intercourse could have been easily managed if the parties had gone about it in the right way." That finding too, in my opinion, is abundantly supported by evidence. Even if intercourse did not take place, as alleged by the plaintiff and found by the learned trial judge (but which I very much doubt), nevertheless it is found on the evidence that such an act could have been done "easily". Thus the marriage could have been consummated. In other words, consummation was not a practical impossibility at the time of the marriage, nor subsequent thereto. The plaintiff has failed to establish the necessary fact to enable the Court to pronounce a decree of nullity.

In this case the plaintiff cannot succeed for another reason. Assuming that the parties did not have intercourse, the stoppage was not physical or mental incapacity but was inaptitude of the defendant. Dr. O'Leary, an expert witness called by the plaintiff, was asked what he could have done to remedy the conditions complained of by the husband. He testified in part:

"I have helped a good many couples . . . it is largely a psychological thing . . . and I find the best part of the treatment is to convince them both that she is normal . . . So many girls are inhibited . . . and with a little suggestion you can get them organized."

"Q. It is curable? A. Oh, yes, sure."

There was not an incurable condition of the defendant, and the plaintiff has in fact established that any inability on his wife's part to have intercourse with him could be cured. She was not unwilling to submit to a remedy, and indeed testified that if a minor operation had been suggested she would have undergone that.

I may add that reading the record of evidence in this case leaves me with a feeling of suspicion that the plaintiff is not acting in good faith. The learned trial judge was not impressed with the demeanour of either of the parties. He was of the opinion that a full, frank, disclosure of all the pertinent facts was not before the Court. I agree. I gravely doubt that the plaintiff's evidence is "the truth, the whole truth and nothing but the truth." The absence of good faith in such cases as this is a matter of substantial importance in determining whether the burden of proof has been discharged. I do not hesitate to say that in my opinion the plaintiff has not in this case discharged that burden.

For the reasons given it would be wrong to declare that the marriage of the parties to this action was null and void. I think that that should not be done, and that the judgment of the learned trial judge should be affirmed.

The appeal should, in my opinion, be dismissed with costs.

Appeal dismissed with costs, HENDERSON J.A. dissenting.

Solicitor for the plaintiff, appellant: Gerard Beaudoin, Toronto.

Solicitor for the defendant, respondent: J. K. Brower, Toronto.

[COURT OF APPEAL.]

Brockville Hotel Company Limited v. Aga Heat (Canada) Limited.

Master and Servant—Master's Liability for Servant's Negligence—Whether Instrument Inherently Dangerous—Oxy-acetylene Torch—Independent Contractor.

The defendant, being under contract to remove a range and canopy from the plaintiff's hotel kitchen, sent an employee, C., and two mechanics, to do the work. C., who was not a mechanic but a salesman, found that the range and canopy must be broken up for removal, and decided that an oxy-acetylene torch should be used for this purpose. He inquired of D., the plaintiff's manager, as to a local man who could use such a torch, and was referred to one H., who owned a machine shop. H.'s son, at C.'s request, came with a torch, and proceeded to cut the stove and canopy. After this part of the work had been completed, D., who happened to be present, asked where it was proposed to cut the leads connecting this canopy with a duct. On being told, D. suggested that the appearance would be better if the cut were made in a different place, nearer the duct, and C. agreed. D. then left and H. proceeded, under C.'s instructions, as he said, to apply the torch. A fire immediately broke out, caused by the ignition of an accumulation of grease in the duct, and considerable damage was caused to the hotel.

Held, the defendant was liable for this damage. The use of the torch involved danger of fire, and the evidence of experts was that such a torch should not have been used in the work. *Blacker v. Lake and Elliott Limited* (1912), 106 L.T. 533, distinguished. It was therefore immaterial whether the work that the defendant undertook to do was regarded as inherently dangerous, imposing a special duty on the defendant, or whether the work in itself was something that could have been done without risk under competent supervision, and the accident had resulted from placing it under the superintendence of a man who did not have the necessary knowledge and experience, and who used an instrument which made it unnecessarily hazardous. There was no justification in the evidence for finding that D. had interfered to take the control of the work out of C.'s hands, or that the plaintiff should have informed the defendant of the condition of the duct. It was the duty of the defendant, if it proposed to use an oxy-acetylene torch, to see that it was used with due regard to the safety of the premises. Nor could the defendant escape on the ground that H. was an independent contractor, for whose negligence the defendant was not responsible. H., whatever he was, was working with the tools and equipment designated by C., and the work which he was employed to do was of an inherently dangerous character, and the responsibility for doing it safely could not, as between the plaintiff and the defendant, be passed on to an independent contractor. *Honeywill and Stein, Limited v. Larkin Brothers (London's Commercial Photographers), Limited*, [1934] 1 K.B. 191, referred to. The work of severing the leads was part of the work undertaken by the defendant, and remained throughout under its charge.

AN appeal from the judgment of Plaxton J., after a trial without a jury, dismissing the action. The facts are fully stated in the reasons for judgment.

24th January 1944. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and KELLOCK JJ.A.

F. J. Hughes, K.C., for the plaintiff, appellant: The evidence clearly shows that when the fire broke out the kitchen was wholly

in the possession of Craig and Henry. The whole effort of the defendant at the trial was directed to placing the entire blame upon Duby, the manager. When the cutting torch was applied to the leads, Duby was not present. It was the duty of the defendant to supply expert knowledge, and to do the work by right methods and under right conditions: *Davidson v. Thompson Plumbing Company* (Barlow J., unreported, November 1943); *H. and C. Grayson, Limited v. Ellerman Line, Limited*, [1920] A.C. 466; *Insurance Company of North America v. Louis Picard & Company, Inc.* (1942), 9 I.L.R. 67.

It is well established that a high degree of care must be exercised when handling fire and exposing property to the hazards of dangerous cutting or welding torches: *Martin v. Dibblee Construction Co. Ltd.*, [1935] O.W.N. 269 at 271; *The Nautilus Steamship Company, Limited v. David and William Henderson & Company, Limited*, [1919] S.C. 605 at 608, 609; *The Pass of Ballater*, [1942] P. 112, [1942] 2 All E.R. 79.

The contract was drawn by the respondent, and if there is any ambiguity as to the meaning of the word "canopy", the contract should be construed *contra proferentem*: *Anderson v. Fitzgerald* (1853), 4 H.L. Cas. 484 at 507, 10 E.R. 551. [ROBERTSON C.J.O.: One must have regard to the conduct of the parties and what they intended by the contract.]

T. N. Phelan, K.C., for the defendant, respondent: In form, this case was a simple action in negligence. The basic inquiry was to ascertain the answers to two questions, namely: (1) What was the proximate cause of the accident? (2) Who was in charge when the proximate cause arose? It was the finding of the trial judge that the particular operation which produced the proximate cause of the accident was directed by the manager of the appellant company. It is a question only whether or not there was evidence to enable the trial judge to find as he did. [GILLANDERS J.A.: The manager did not specify the method; he did not supervise how it was done.] [ROBERTSON C.J.O.: The findings of fact go very far to place the onus upon the manager. The respondents would know the nature of the implements they were employing.] In the words of the trial judge, the oxy-acetylene torch may be assimilated rather to the case of the brazier lamp, which in *Blacker v. Lake and Elliott Limited* (1912), 106 L.T. 533 was not classified as a thing dangerous in itself but was treated as a thing dangerous only *sub modo*. If a plaintiff

is the author of his own misfortune, and the cause of the damage is his own neglect, he cannot recover: *Postmaster-General v. Corporation of Liverpool*, [1923] A.C. 587.

Two very recent cases suggest a definite departure in the principles governing the responsibility for negligence: *Glasgow Corporation v. Muir et al.*, [1943] A.C. 448; and *Hay or Bourhill v. Young*, [1943] A.C. 92. The principle of law in the *Glasgow* case applies exactly to the respondents here. The trial judge's findings of fact are supported by the evidence.

If this Court takes the view that the respondents were liable, then we contend that there was no evidence to support the amount of the appellant's damages except in respect to the roof repairs. The assessment of damages is more a conjecture than a scientific assessment. At the critical moment, the respondent had no legal responsibility for what Henry was doing. The manager of the appellant company had the power and right of control, which he exercised, having taken the matter out of the respondent's hands. The latest authority with reference to responsibility for the acts of a loaned servant and the right of control is to be found in *Century Insurance Company, Limited v. Northern Ireland Road Transport Board*, [1942] A.C. 509, [1942] 1 All E.R. 491. It was established here that the relationship of master and servant did not exist between the respondent and the third party.

F. J. Hughes, K.C., in reply: Many of the findings of the trial judge are conjectures, not findings of fact or inference. *Blacker v. Lake and Elliott Limited, supra*, is not comparable to the present case.

Cur. adv. vult.

29th March 1944. ROBERTSON C.J.O.:—This is an appeal by the plaintiff in the action from the judgment of Mr. Justice Plaxton, dated 28th May 1943, at the trial of the action before him, without a jury, at Toronto. The action was dismissed with costs.

By a contract in writing dated 12th May 1941, the respondent agreed with the appellant to deliver and erect in the kitchen of appellant's hotel an Aga cooker, and to remove a range and canopy then in use. A few days after the date of the contract, when the respondent's men were removing the range and canopy, a fire was caused in the hotel premises, as a result of which

the appellant sustained substantial damage. It alleges that its loss and damage were sustained by reason of the failure of the respondent, its servants and agents, to use reasonable care and skill in the removal of the range and canopy. More particularly it is alleged that the respondent brought upon the premises, and used in the work it had undertaken to do, an oxy-acetylene torch, which, it is alleged, was a dangerous thing to use, and the appellant complains that the respondent failed to keep the flame from the torch under control. The learned trial judge found that if there was any want of care in the use of the oxy-acetylene torch, it was want of care on the part of appellant's manager. He was of the opinion that the oxy-acetylene torch was not a thing dangerous in itself, and that the standard of care required of the respondent in executing the work it was called upon to do was that which was reasonable in the circumstances. He held that the appellant's manager interfered in the work, and directed the doing of the act that caused the fire from which the damage arose, and that his negligence, and his alone, was the cause of the casualty.

The appellant had, in its hotel kitchen, a large cooking range that had been in use for a number of years. There was suspended over the range, by chains from the ceiling, a metal canopy for collecting the fumes that arose from the cooking operations. The top of the canopy was connected by two metal leads, or pipes, with a large metal duct that ran across the kitchen just below the ceiling. The duct ran from the south wall of the kitchen, where it appears to have served to draw off the vapour and odors from a dish-washing machine, and found its exit from the kitchen in the north wall. It then passed up inside the partition through the roof of the hotel to the open air. At or near the top of the duct there was an electric fan, with motor, which could be used when desired to create a draught in the duct to assist in drawing off the vapour and foul air from the kitchen. It was in this duct, or in the leads connecting the canopy with it, that the fire was started that caused the damage complained of. While the canopy itself was kept scrupulously clean, the duct was a permanent fixture, without openings that would enable the inside to be reached to be cleaned out. The leads were also permanently affixed to the canopy at the lower end, and to the main duct at the upper end. They were some eight or ten feet in length, and there

was an elbow in each of them that made it difficult, if not impossible, to clean them throughout their full length, and which also prevented any easy observation of their condition inside. No doubt, there was, during the years they had been in use, an accumulation of grease and other substances deposited on the inside of the main duct, and probably to some extent in the leads. It was assumed by all parties at the trial that the fire in question was caused by a flame or sparks from the oxy-acetylene torch setting fire to the grease and other substances on the inside of the duct or leads.

The contract between the parties had been under negotiation for a long time, and both the manager and the assistant manager of the respondent had inspected appellant's premises, and had some knowledge of the means by which the kitchen vapours were collected and carried off. In a letter of 6th January 1939, the respondent's assistant manager, in writing to the appellant, said as follows:—

"The use of AGA Equipment eliminates a great many of the gadgets which are used to remove odors, etc. from kitchens where other equipment is used. The canopy over your present range, which in itself is a harbour for dirt and grease, could be removed. The ventilator fan, which is being used at present and which is causing considerable discomfort to occupants of the adjacent bedrooms, could be stopped or removed. This would effect a saving in electric power, and would also prevent any complaints about its noise."

A salesman of respondent, named Craig, finally secured appellant's contract in May 1941, and the respondent sent Craig, with two of its mechanics, to remove the old range and canopy, and to instal the Aga cooker. Craig is not a mechanic, and there is no evidence that any special information or instructions were given to him by respondent with respect to the work of which he was to be in charge. Neither does it appear that either of the mechanics whom respondent sent with him took any part in the work, so far as it had proceeded when the fire broke out.

On his arrival, Craig examined the exits from the kitchen to see whether the range and canopy could be taken out intact. He found that that could not be done, and as they would require to be broken up, he decided that it would be necessary to use an oxy-acetylene torch to cut such parts as could not be broken with a hammer. Craig had never used an oxy-acetylene torch

in any work on which he had been engaged by the respondent, and had not been supplied with one on this occasion. He informed Mr. Duby, the manager of appellant's hotel, that to do this work he would require a man with a torch, and inquired as to a local man. Mr. Duby referred him to a man named Henry. Craig saw Henry, and arranged with him to send his son, with an oxy-acetylene torch, and a helper, to the hotel that evening, to help in the removal of the range. Henry Sr. says nothing was said to him about removing the canopy.

After dinner was over at the hotel that evening, the work of removing the range and canopy was proceeded with. The cast-iron parts of the range were broken up with a hammer, and the sheet metal parts were cut, where necessary, with the oxy-acetylene torch, young Henry handling the torch. Then the canopy was cut in two pieces by Henry, with the torch. The next step, according to Craig, was to disconnect the canopy from the duct. The leads connecting them had to be severed. Mr. Duby, who had been in and out of the kitchen during the progress of the work, happened to be present at the time, and inquired of Craig where they were disconnecting the leads, and Craig replied that they were doing it right at the canopy. Mr. Duby remarked that he thought the appearance would not be very good if the leads were left hanging from the main duct, and he asked that they be disconnected at a point nearer the main duct, and to that Craig assented. Duby did not then remain in the kitchen, and was not present when the work was proceeded with. He had gone up to his own room in the hotel. While he was absent, Henry, using the torch, proceeded, in Craig's presence, and, he says, under Craig's instructions, to cut one of the leads at a point near the main duct, and a fire was almost immediately started which they were unable to check with a fire extinguisher. The fire extended throughout the duct to the roof, and a good deal of loss and damage resulted.

There is clearly a case here that the respondent has to meet. It had undertaken the work in hand after inspection of the premises, and with ample opportunity to become informed of anything that it was necessary to know for the proper carrying out of the work. It may be that to respondent's manager and assistant manager, both of whom had inspected the premises, the removal of the canopy did not appear to involve any element of risk to appellant's premises. The use of an oxy-acetylene

torch was Craig's idea. In the light of the evidence of expert witnesses called for the appellant, it is, to say the least, doubtful whether a more skilled and experienced person than Craig would have thought it necessary or proper to employ anything that exposed appellant's premises to risk.

The learned trial judge did not consider that the oxy-acetylene torch belonged to the class of things considered in the eye of the law to be dangerous in themselves, or which fall within that category where the law exacts a very high degree of care, and he cited the case of *Blacker v. Lake and Elliott Limited* (1912), 106 L.T. 533. It does not seem to me that the case cited has anything whatever to do with such a case as the present. It was the case of a brazier lamp that exploded, and the action was for the resulting damage against the person who had sold the lamp without warning of its alleged dangerous nature. The question that arises here is in no way similar. An oxy-acetylene torch, unless handled with care, and with proper regard to the surroundings, is liable to cause a fire. According to the uncontradicted evidence of experts called for the appellant, the heat from such a torch amounts to 6300°, and sparks are thrown by it to distances of 15 and 20 feet. Before Henry Sr. consented to send his son with the torch, he inquired of Craig the nature of the floor in the kitchen, and was informed that it was a terrazzo floor. As an additional precaution to be taken in using the torch, he told Craig that it was necessary to provide a fire extinguisher. The expert evidence is that it was unnecessary to use such a torch to cut the leads in question, as a pair of snips would have been sufficient, and that the torch should not, in any event, be used until it is known that it is safe to do so. It is a matter of considerable significance in this aspect of the case that the respondent called no witness to contradict the appellant's experts, or to give evidence either as to the need to use the torch, or as to the propriety of using it in such a place without full inquiry as to the nature of the surroundings, in so far as the risk of fire is concerned. Craig made no inquiry in regard to the premises. He is not shown to have had any previous experience in the use of such a torch, nor to have known its dangers. I think it matters little whether the work that the respondent undertook to do is regarded as of an inherently dangerous character, that on that ground imposed a special duty on the respondent, or whether the work in itself was

something that could have been done under competent superintendence without risk of damage, but was placed by the respondent under the superintendence of a man who did not have the necessary knowledge and skill and experience, and who used, in the execution of the work, an article that made it unnecessarily hazardous. In either case the respondent has a heavy burden upon it if it is to escape liability for the damage that was done.

It is contended for the respondent, and the learned trial judge agreed with the contention, that the real cause of the fire was the act of Duby, the appellant's manager, in directing that the lead should be severed at a point close to the main duct. It is urged that Duby knew that the main duct had not been cleaned out since its original installation, and that, notwithstanding that knowledge, he not only failed to inform Craig of this fact, but actively interfered by directing the severance of the lead from the main duct to be made at a point that was dangerous, and that this was the real cause of the fire. The learned trial judge expressed his belief that if the lead had been severed at the point where Craig intended to sever it, probably no fire would have occurred. As to this latter point, there is no evidence that bears directly upon it. There is not even a competent opinion put forward in evidence that supports the belief of the learned trial judge that the fire would not have occurred if the leads had been severed by the torch at the canopy, instead of at the main duct. Nothing was done to prevent the sparks thrown by the torch from going where they would, and although the fan at the top of the duct was not in operation at the time, young Henry, who did the cutting, speaks of a strong upward draught in the duct.

It was strongly pressed upon us that it was the duty of appellant's manager to inform Craig of conditions inside the duct, although Craig made no inquiry about it. I do not think such a duty rested upon the appellant or its manager. The work in hand had been undertaken by the respondent. It was the respondent's duty to exercise all reasonable care in the appointment of a competent person to execute the work, and in the supply of proper implements and tools for its execution, and in the actual doing of the work, so that the work might be done without injury to appellant's premises. No comparable duty was upon the appellant. If the respondent proposed to use an oxy-

acetylene torch in the execution of the work, the duty was upon the respondent to see that it was used with due regard to the safety of appellant's premises, and otherwise not to use it at all. The appellant and its manager were not experts in this kind of work, and had no control of the instruments or tools used by the respondent. *H. and C. Grayson, Limited v. Ellerman Line, Limited*, [1920] A.C. 466, particularly at p. 473; *The Nautilus Steamship Company, Limited v. David and William Henderson & Company, Limited*, [1919] S.C. 605; *The Pass of Ballater*, [1942] P. 112, [1942] 2 All E.R. 79. Further, if Craig had known what his superiors knew about the condition of the duct, as disclosed by their letter of 6th January 1939, already referred to, he would have known all that appellant could tell him in regard to conditions. Craig himself had visited the premises before in connection with procuring the contract, and appellant was entitled to assume that he knew what he needed to know to enable him to proceed in a proper manner with the work. Craig decided to use the oxy-acetylene torch without consulting anybody, and he did not consult any one during the progress of the work, to ascertain whether or not it would be safe to use the torch at any particular place. Duby, the hotel manager, had no occasion to consider what implement or tool would be used, or should be used, to sever the leads. He was entitled to assume that respondent would employ only such appliances at each stage of the work as could be used with safety to appellant's premises.

In my opinion, the learned trial judge has placed a construction upon the evidence as to Duby's part in the cutting off of the leads that the evidence will not bear. There are no contradictions in any essential particular in the evidence in this respect. In fact there is little contradiction between appellant's and respondent's witnesses throughout. On the matter of severing the leads the learned trial judge concludes as follows:—

"In the present instance, on the evidence, Mr. Duby, the general manager of the plaintiff company's hotel, undertook to interfere, with the acquiescence of Mr. Craig, the defendant's employee, and did interfere, in the work of severing the lead ducts by the use of oxy-acetylene torch. He directed that the ducts should be severed flush with the main duct and not at the point where Mr. Craig intended to sever them, *viz.*, immediately at the point where they were connected with the canopy.

Duby admitted he knew the main duct had not been cleaned out since its installation fourteen years before; and he, alone of those present, knew, or ought to have known, that the point where he directed the cut to be made was, in the circumstances of the case, a dangerous point at which to use an oxy-acetylene torch. His negligence, and his alone, was, in my view, the cause of the casualty which occurred."

With respect, I can find no warrant in the evidence for the statement that Duby interfered in the work of severing the leads by the use of the oxy-acetylene torch. Neither the torch nor any other means was mentioned or referred to in the discussion. The only matter discussed was the point at which severance would be made, and Duby had departed and was in his own room when the actual cutting was proceeded with. It was a very simple matter, indeed, that Duby raised with Craig. The leads that attached the canopy to the main duct had to be severed at some point, as part of the work of removing the canopy. Duby preferred that they should be severed close to the duct, for the very understandable reason that it would not look well to have the leads projecting from the main duct into the kitchen, when the canopy had gone. The same amount of cutting had to be done wherever they were cut and Craig made no demur on hearing Duby's suggestion. On the contrary he treated it as a matter of indifference so far as the respondent was concerned. He would sever the leads at whatever point Duby desired. By what means they should be severed not only was not discussed, but there is nothing in the evidence to suggest that either party had that in mind during the discussion. I do not think that anything that Duby said or did can be regarded as an interference by him with the performance of the contract, nor do I think that Craig so regarded it. To please a customer, Craig acquiesced in a matter of detail that he thought of no consequence to him or his employer. (See *Century Insurance Company, Limited v. Northern Ireland Road Transport Board*, [1942] A.C. 509, [1942] 1 All E.R. 491).

In estimating the importance of Duby's alleged interference, it is always to be borne in mind that there was no need to use the torch to cut the leads. The evidence of Mr. Sorley, a man of great experience, is that this could have been done conveniently with a pair of snips, and this evidence is not contradicted. Duby had no knowledge or control of the means that would be used.

That was always a matter for Craig. Duby was entitled to assume that Craig would proceed with due care and caution, and he did nothing to prevent Craig so proceeding. If Craig had been competent, and had had experience in the use of such a torch, and had known the risks that attended its use, he would not have used it on this particular part of the work, in any event not until he had learned by careful inquiry what the actual conditions were. With every respect to the learned trial judge, it is, in my opinion, quite out of the question to shift to Duby the responsibility for the careless and unnecessary use of the torch in a place where there was danger of fire. That responsibility belongs to Craig, and to his employer, the respondent.

It is also contended for the respondent that as it was Henry who undertook the breaking up of the range and canopy, and as Henry was recommended to Craig by Duby, the respondent is not liable for the damage caused by Henry's use of the torch. This was put in two ways. It was suggested that, appellant's manager having recommended Henry to Craig, the appellant cannot complain if Henry proved to be careless or incompetent. It does not seem to me that that result would follow, even if it were shown that young Henry was careless or incompetent. Henry says he did no more than obey Craig's orders. But even if young Henry was negligent on this occasion, there is no evidence that he was such a workman as Duby should not have referred Craig to, when Craig asked where he could find a local man with an oxy-acetylene torch. The respondent also contends that Henry was an independent contractor, and that the respondent is not liable for his negligence. I do not think Henry was an independent contractor. Whatever he was, he was working with the tools and implements that Craig directed him to bring and to use. Further, if Henry was an independent contractor, the work that he was employed to do, as directed by Craig, was of an inherently dangerous character, and the responsibility for doing it safely could not, as between the respondent and the appellant, be passed on to an independent contractor: *Honeywill and Stein, Limited v. Larkin Brothers (London's Commercial Photographers), Limited*, [1934] 1 K.B. 191; *The Pass of Ballater, supra*.

In my opinion the work of severing the leads was part of the work undertaken by the respondent, and it remained throughout under its charge, and the responsibility for the damage done

to appellant's premises rests upon it. The respondent was engaged in removing the range and canopy, and did it negligently: *Jefferson et al. v. Derbyshire Farmers, Limited*, [1921] 2 K.B. 281.

The appeal should be allowed, and there should be judgment for the appellant for the sum of \$6,149.80, and the appellant should have the costs of the action and of the appeal.

The appellant claims the further sum of \$1,070 as damages to the main duct, but the learned trial judge held that this item could not properly be included as part of the appellant's loss, and I am not disposed to disagree with him. While, no doubt, the duct was damaged by fire, whether that resulted in any loss to the appellant, and if so, to what extent, does not satisfactorily appear. If the appellant desires to further pursue that part of its claim, there may be a new assessment, the costs of which will be in the discretion of the judge before whom it is had.

GILLANDERS J.A.:—The plaintiff (appellant) is the owner of an hotel building, and brought this action claiming damages for loss by fire, alleging that the fire was caused by the negligence of the defendants (respondents).

The respondents had sold to the appellant an Aga cooker to be installed in the kitchen of the appellant's hotel to replace a large cast-iron cooking range and some equipment used in connection therewith. The contract between the parties covered an "Aga Cooker delivered and erected and including flue material to connect to chimney duct and removal of range and canopy." Above the old range hung a sheet metal canopy some 17 feet 6 inches long and 5 feet high, suspended from the ceiling by chains. Two leads connected openings in the top of the canopy to a main duct hung near the ceiling. This main duct, after entering the north wall of the building, was carried upwards through the penthouse to the open air, and was equipped with a fan and motor to draw off smoke, fumes and odours. It was necessary to break up the old range and metal canopy to effect the removal of the old equipment. It was desired that this work, and the installation of the new equipment, be done with as little disturbance and as short an interruption in the use of the kitchen as reasonably possible. The respondents' agents, after inspection, decided that it was necessary or desirable to use an

acetylene torch to do the cutting, and on inquiry from the appellant's manager as to who the respondents might get locally to do this work, they were referred to, and engaged, Henry's Machine Shop, afterwards made a third party in this action, but not concerned in the present appeal. Arrangements were made, in pursuance of which two employees of Henry's Machine Shop came to remove the old range and canopy. The range was broken up with a hammer and an acetylene torch which Henry's men had provided, and the large canopy over the range was cut in two with the acetylene torch. The canopy was cut by applying the torch to the inside and cutting from side to side about the centre. The two workmen then were about to sever the canopy from the two leads running therefrom to the main duct.

At this point, Mr. Duby, the manager of the appellant's hotel, came into the kitchen and inquired where it was proposed to disconnect the leads from the canopy. On being told by Craig, respondents' man who was in charge, that this was being done right at the canopy, Craig's evidence at this point is as follows:

"WITNESS: Mr. Duby remarked he thought the appearance would not be very good to have that duct hanging down there in that condition and he wished the cut to be made at a point nearer—which he indicated of course with his finger—at a point nearer the main duct.

"Q. Yes? And what did you say to that? A. I said 'That is entirely up to you, Mr. Duby, if you wish to instruct Henry & Company to cut it there, go ahead, sir.'

"Q. Having told Mr. Duby to go ahead what occurred between him and Henry's men? A. Well, we were all standing together and it was I guess implied . . .

"MR. HUGHES: I am objecting, my Lord.

"MR. PHELAN: Q. Don't guess what was implied; just tell us what Mr. Duby said when you told him to 'go ahead, sir'. A. He indicated what he wished.

"MR. HUGHES: I object.

"WITNESS: He indicated where he wished the cut to be made."

After this conversation, Mr. Duby left the kitchen, before the cutting of the leads was started. After he had left, and with Craig and another representative of the respondents present in the kitchen, Henry's men proceeded by using the acetylene

torch to cut one of the leads at a point about two inches from where it entered the main duct. The under-surface of the lead was cut without mishap, but while they were cutting the north side there was a roar from fire which had broken out in the main duct. That was the start of the fire which caused the damage of which the appellant complains. Apparently a layer of grease and dirt, which had accumulated in the main duct, took fire from the heat of the torch, and burned vigorously.

The evidence indicates that the under-surface of the canopy and the kitchen otherwise was kept clean and in good condition.

The trial judge finds as follows:

"In the present instance, on the evidence, Mr. Duby, the general manager of the plaintiff company's hotel, undertook to interfere, with the acquiescence of Mr. Craig, the defendants' employee, and did interfere, in the work of severing the lead ducts by the use of oxy-acetylene torch. He directed that the ducts should be severed flush with the main duct and not at the point where Mr. Craig intended to sever them, *viz.*, immediately at the point where they were connected with the canopy. Duby admitted he knew the main duct had not been cleaned out since its installation fourteen years before; and he, alone of those present, knew, or ought to have known, that the point where he directed the cut to be made was, in the circumstances of the case, a dangerous point at which to use an oxy-acetylene torch. His negligence, and his alone, was, in my view, the cause of the casualty which occurred." On these findings, he dismissed the action.

There is no doubt that the employer of an independent contractor might, by exercising control over the contractor's servants and directing not only the work to be done but the manner of doing it, make himself responsible to third persons for the acts of the contractor's servant, on the basis that *qua* the acts in question the servant was acting not as servant of and under the control of the contractor but as servant of the contractor's employer and under his control and orders.

As stated by Lord Watson in *Union Steamship Company, Limited v. Claridge*, [1894] A.C. 185 at 188:

"That the servant of A. may, on a particular occasion, and for a particular purpose, become the servant of B., notwithstanding that he continues in A.'s service and is paid by him, is a rule recognised by a series of decisions."

In *Canadian Northern Transfer Co. v. Toronto Storage Co.* (1924), 55 O.L.R. 352 at 355, Latchford C.J., says in part:

"Many cases arising out of tort embody a principle that is not without application here. *Bain v. Central Vermont Railway Company*, [1921] 2 A.C. 412, 59 D.L.R. 445, 28 C.R.C. 223, [1921] 3 W.W.R. 44, is a recent example. Lord Dunedin, delivering the judgment of the Judicial Committee, expressed his approval of the statement of the law made in one of the Courts below by Cross, J. who said:—

"It is well established that the master, in whose general service a man is, is not responsible for the tortious act of the man if the control of the master has been, for the time being, displaced by the power of control of another master into whose temporary service the man has passed by being lent (even gratuitously) or sub-contracted' [1921] 2 A.C. at pp. 414, 415).

"Lord Dunedin in the same case (p. 416) stated that their Lordships were of the opinion that the law was accurately laid down by Bowen, L.J., in *Donovan v. Laing, Wharton, and Down Construction Syndicate, Limited*, [1893] 1 Q.B. 629 at 633, 634, where he said:

"We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act.'

In the same case Ferguson J.A. points out that "the authorities do not enunciate any positive test or formula by which the relationship of master and servant may be positively determined, but on the contrary make it clear that each case must be determined on its own facts and circumstances"

The old case of *M'Laughlin v. Pryor* (1842), 4 M. & G. 48, 134 E.R. 21, is mentioned in the quotation from Clerk & Lindsell on Torts applied by the learned trial judge. In that case a party, consisting of the defendant and others, had hired a carriage and horses driven by postillions who were servants of the owners of the horses. The plaintiff was a passenger in a gig which was overturned through the negligent driving of the carriage and horses. The defendant, at the time and afterwards, admitted that he had control over the driving of the post boys at the time of the accident, and tacitly assented to and encouraged the doing of the acts which caused the damage, and was accordingly held liable.

On the facts of the case at bar, it should be distinguished. In the case at bar it was part of the respondents' duty under this contract to remove the canopy. The respondents had designated and provided the method and manner of carrying out the work. They engaged men to do the work for them. It is true that the appellant's manager indicated where he desired the leads cut, but in the circumstances here it should not be held that he took the control, direction and supervision of the doing of the work out of the hands of the respondents. He was not present, nor was he exercising control over the workmen in the particular manner or method to be used. The respondents were doing work for which they were employed. The acetylene torch was the instrument selected and used under their directions for this purpose. Their representative was present in the kitchen with the workmen when the actual cutting operation was commenced and performed. The obligation was still on the respondents to see that such an instrument was used with reasonable care in the circumstances. It should not be held here that the plaintiff had assumed control and direction of the work so as to relieve the defendants from responsibility.

It is urged that the acetylene torch should not be held to belong to the class of things considered to be dangerous in themselves but should be classed as something only dangerous *sub modo*, as the brazier lamp in *Blacker v. Lake and Elliott Limited* (1912), 106 L.T. 533. That case arose from a claim made against the manufacturers of a brazing lamp which had exploded in use, causing injuries to the plaintiff. It was there held that the trial judge should have charged the jury that the brazing lamp was not a dangerous instrument in itself, and was not dangerous in the way it was constructed, so as to bring it within the category of chattels in dealing with which a person incurs a special risk. That case affords little help here.

In this case the acetylene torch was at all relevant times in the hands of the persons who are alleged to have caused damage by its use. The claim does not involve any allegation that it was improperly constructed, but is that it was negligently used. Whatever might be said of such an article as supplied by a manufacturer, when it is connected to a supply of gas and set alight for use, supplying a flame of high temperature and in the hands of an operator to be used and applied, it becomes, in my view, a dangerous thing to be used with consummate care and a high

degree of caution. In *Honeywill and Stein, Limited v. Larkin Brothers (London's Commercial Photographers), Limited*, [1934] 1 K.B. 191 at 197, it is stated by the Court of Appeal: ". . . for the purpose of this case it is only necessary to consider that part of this rule of liability which has reference to extra-hazardous acts, that is, acts which, in their very nature, involve in the eyes of the law special danger to others; of such acts the causing of fire and explosion are obvious and established instances."

Holding the view, as I do, that the evidence does not establish that the appellant's manager intervened so as to take the control and direction of the work and the manner of doing it out of the hands of the respondents, the duty remained on the respondents to see that adequate care was taken in the use of the method which the respondents had adopted. This was not done. No inquiry was made from the appellant's manager, nor was any investigation made, as to the condition of the interior of the main duct. In the use of such a dangerous instrument, I think, the respondents were not entitled to make any assumption as to the propriety of the method without adequate investigation. What occurred was the direct result of failure to exercise such reasonable prudence in the application of the particular method which they had adopted.

The learned trial judge, in assessing the plaintiff's damages at \$6,149.80, says:

"I admit there is nothing very scientific about the assessment of damages at that amount, but the evidence led was very vague in some respects, and it is the best estimate I can make."

Counsel for the appellant urges that an item of \$1,070 claimed for damage to the main duct should not have been disallowed, and counsel for the respondents urges that the evidence on damages in any event would only support a finding for a very small amount.

After reading the evidence, I think the damages should be fixed at the amount assessed by the learned trial judge, \$6,149.80, unless either party desires to have a new assessment.

The appeal should be allowed and the appellant should have judgment for \$6,149.80 subject to the right of either party to have a new assessment of damages, if desired. The appellant should have its costs here and below. If a new assessment of

damages is taken, the costs of that assessment will, of course, be in the discretion of the presiding judge.

KELLOCK J.A. agrees with ROBERTSON C.J.O.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Hughes, Agar & Thompson, Toronto.

Solicitors for the defendant, respondent: Phelan, Richardson, O'Brien & Phelan, Toronto.

[COURT OF APPEAL.]

Re Thompson Estate.

Trusts and Trustees—Right to Reimbursement for Charges and Expenses—Solicitor and Client Costs of Litigation—Beneficiary of Trust (Part of Estate) Suing Executors and Trustees—What Fund to Bear Costs.

It is well settled that trustees are entitled to full indemnity out of the trust estate against costs, charges and expenses not improperly incurred. *Smith v. Beal* (1894), 25 O.R. 368 at 382; *Attorney-General v. Mayor of Norwich* (1837), 2 My. & Cr. 406 at 424, applied. The guiding principle is to determine whether or not the proceeding in question has been for the benefit of the trust estate. *Walters v. Woodbridge* (1878), 7 Ch. D. 504 at 509, 510; *In re Dunn; Brinklow v. Singleton*, [1904] 1 Ch. 640, applied.

The same principle which determines when there is a liability to indemnify applies to determine where that liability lies. The principle is founded in equity, and the estate which derives the benefit from proceedings prosecuted or defended by the trustee should bear the costs of the proceedings. The right to indemnity is therefore enforceable against the trust estate in respect of which the trustee has incurred the debt or liability, and not against any other estate or fund. *Elliott v. Canadian Credit Men's Trust Association, Limited*, [1935] S.C.R. 1 at 2, applied.

Costs—Award against Unsuccessful Party—No Power to Award Solicitor and Client Costs.

There is no principle upon which the Court can order an unsuccessful litigant to pay the solicitor and client costs of the successful party. *Patton v. Toronto General Trusts Corporation et al.*, [1930] A.C. 629, referred to. Not only can this not be done directly, it cannot be done indirectly. Thus, where a *cestui que trust* unsuccessfully sues the trustees (who are also executors of an estate of which the trust is a part), the defendants, having recovered their party and party costs, cannot be permitted to recover from the trust fund the excess of solicitor and client costs over the party and party costs. This excess must be recovered from the general estate, for the benefit of which the litigation was defended.

Judgment of Barlow J., *ante*, p. 31, reversed.

AN appeal by Edythe G. Lamport from the judgment of Barlow J., *ante*, p. 31, [1944] 1 D.L.R. 354. The facts are fully

stated in the reasons of the trial judge and in those of LAIDLAW J.A.

6th March 1944. The appeal was heard by RIDDELL, HENDERSON and LAIDLAW JJ.A.

J. R. Cartwright, K.C., for the legatee, appellant: The effect of the order appealed from is to give to the trustees their solicitor and client costs as against an unsuccessful hostile plaintiff, and this is never done: *Patton v. Toronto General Trusts Corporation et al.*, [1930] A.C. 629 at 639, 39 O.W.N. 5, [1930] 4 D.L.R. 321, [1930] 3 W.W.R. 1. The only question is out of what fund the executors were entitled to recoup themselves for the amount representing the difference between the party and party costs and the solicitor and client costs. If the present order is allowed to stand, the executors are entitled to recoup themselves out of the capital of the Lamport trust. In our view the executors should have been held entitled to recoup themselves out of the residue of the estate.

While the executors were entitled to two sets of party and party costs, they were not entitled to two sets of solicitor and client costs. The theory on which they are entitled to the solicitor and client costs is that they were acting as trustees, and in so far as they were acting as trustees, their interests were identical. The proceedings were defended by the executors for the benefit of the residuary estate. If the action had succeeded, the Lamport trust would have been augmented at the expense of the residuary estate, and as it was for the benefit of the residuary estate that the executors were defending, it is submitted that it is to that fund that they should look for recoupment: *In re Beddoe; Downes v. Cottam*, [1893] 1 Ch. 547 at 562; *Fraser or Robinson v. Murdoch* (1881), 6 App. Cas. 855.

There is no complaint of having to pay the party and party costs, but there is no precedent for adding thereto the solicitor and client costs. *Re Fraser Estate* (1897), 30 N.S.R. 272, is distinguishable from the case at bar. There, the question involved was one of party and party costs only, and further, there had been a substantial loss. [LAIDLAW J.A.: If the defendants in the litigation had been sued only as trustees of the special fund, would they not be entitled to costs out of the special fund?] It would be in the discretion of the judge. The fund which was defended should be the one that pays the costs.

R. F. Wilson, for the executors and trustees, respondents: The right of trustees to costs depends on whether or not the defence of the action was for the benefit of the estate. The whole action was with respect to the Lamport trust, so it is right and equitable that the trustees' costs and expenses should be borne by that fund. If it were otherwise, the residuary beneficiaries would suffer as the result of an action brought by the beneficiary of the trust, and this is clearly contrary to authority as stated in *Re Fraser Estate* (1897), 30 N.S.R. 272 at 274. [LAIDLAW J.A.: Could it be reasonably said that defence of this action was for the benefit of the Lamport trust? Was not the residuary estate the only estate that could benefit from this action, and in that event, should the solicitor and client costs not be paid out of the residuary estate?] It is open to this Court to apply equitable principles in such a case as this, and to regard the problem on an equitable basis. On the facts of this case, these costs should be borne by the appellant; the executors were entitled to defend the litigation, and their defence was for the benefit of the estate.

The executors have not been guilty of any misconduct and consequently they are entitled to be recouped all costs, charges and expenses properly incurred in the execution of the estate: *Walters v. Woodbridge* (1878), 7 Ch. D. 504 at 510; *In re Knapman*; *Knapman v. Wreford* (1881), 18 Ch. D. 300 at 304; *Stott v. Milne* (1884), 25 Ch. D. 710 at 715; *Smith v. Beal* (1894), 25 O.R. 368 at 382; *In re Llewellyn*; *Llewellyn v. Williams* (1887), 37 Ch. D. 317 at 327. [HENDERSON J.A.: The cases you are citing go no further than what the appellant's counsel has conceded here] [LAIDLAW J.A.: Would it be equitable to permit the residuary legatees to escape the burden of costs when the action was successfully defended for their benefit? The beneficiary will pay the party and party costs, but should not the solicitor and client costs come out of the residuary legatees' fund?] It was the beneficiary who instituted the proceedings, and it would be unfair and inequitable if her legacy were not called upon to bear the expenses incurred by the executors in the defence of this action.

T. J. Agar, K.C., for the assignees of certain residuary beneficiaries, respondents: The residuary beneficiaries should not have their share in the estate reduced by costs incurred as the result of a suit to benefit a particular trust at the expense of

the residuary estate, where such action fails: *Re Fraser Estate* (1897), 30 N.S.R. 272 at 274. The costs were incurred as a result of litigation concerning the trust agreement. [LAIDLAW J.A.: What benefit was it to the trust fund to defend this action? The residuary legatees are going to gain the benefit of the litigation and not be called upon to pay any of the solicitor and client costs. Why should the Court concern itself at all with an assignee?] The pocket of the assignee is affected by the result; therefore he has a status to make his submission to the Court.

J. R. Cartwright, K.C., in reply: The cases cited by the respondents are those in which the conduct of the trustees benefited the estate.

Cur. adv. vult.

4th April 1944. RIDDELL J.A.:—The facts in this case sufficiently appear in the careful judgment of the judge in the court below. The simple question is whence is to come the excess of solicitor and client costs to the executors of an estate in an action relating to a particular fund. That fund is to pay party and party costs. The learned judge from whose judgment the appeal is taken decided that the excess should also come out of it.

It might seem that it would be in accordance with the principles of justice that the fund that occasioned the litigation should pay all the costs thereby occasioned to the estate, and the learned judge has written a careful and persuasive judgment in that sense.

However this may appear to us, we are not to adjudge according to our own views of justice but according to the law. And there can be no doubt that the law as laid down by competent authority directs that the excess costs must be paid by the estate in whose interests an adverse claim is defended against.

I can find no authority justifying me in directing these costs to be paid otherwise than by the estate. I therefore concur in the allowance of the appeal with costs, these in the usual manner, as set out in the judgment of my brother Laidlaw.

HENDERSON J.A. agrees with LAIDLAW J.A.

LAIDLAW J.A.:—This is an appeal by Edythe G. Lamport, a legatee under the will of the late Alexander Montgomery Thompson, from an order made by Barlow J. on 14th December 1943, upon application by the executors and trustees of the will for the

opinion, advice and direction of the Court. The question to be determined is whether certain costs incurred by the executors are payable out of the residue of the estate or out of a fund set apart by the executors in trust for the benefit of the testator's daughter, Edythe G. Lamport.

The testator died on 18th October 1929. By his will he directed his executors and trustees to set apart the sum of \$100,000 for the benefit of his daughter Edythe G. Lamport, and to hold the said sum upon certain trusts and subject to certain events. After setting apart the above-mentioned bequest the executors were required by the will to divide the residue of the estate between the testator's two sons, Harry Alcroft Thompson and Stanley Alexander Thompson, in equal shares. The executors realized and set apart trustee securities on account of the trust described in the will in favour of the beneficiary to the amount of \$60,000, but by reason of market conditions found it desirable to postpone the sale of unrealized assets of the estate and the setting apart of the balance of the trust fund. An agreement for that purpose was made under seal, dated the 7th day of August 1931, between the executors, the beneficiary Edythe G. Lamport, and the residuary legatees. In 1936 the trust fund was completed to the sum of \$100,000.

On 19th March 1937, Edythe G. Lamport commenced an action in the Supreme Court of Ontario against Harry Alcroft Thompson, Stanley Alexander Thompson and Chartered Trust and Executor Company as "Executors and Trustees of the last Will and Testament of Alexander M. Thompson, deceased, and Trustees of the Edythe G. Lamport Trust", and the said Harry Alcroft Thompson, Stanley Alexander Thompson and Chartered Trust and Executor Company. In that action the plaintiff claimed: "judgment setting aside the said agreement of the 7th day of August, 1931 . . ."; payment of alleged arrears of interest in respect of the trust fund; judgment directing the executors to make certain payments into the trust fund; damages for alleged breach of duty of the defendants; an order removing the defendants as trustees of the trust fund; an order restraining the defendants "as executors and trustees of the said estate of the said deceased from intermingling with the assets of the estate until the complete establishment of the said trust fund of \$100,000"; and further and other relief.

After trial before Hogg J., the action was dismissed with costs; an appeal to the Court of Appeal for Ontario was dismissed with costs, and a further appeal to the Supreme Court of Canada was likewise dismissed with costs.

There can be no doubt that the plaintiff is liable personally to the defendants for the amount of party and party costs allowed by the taxing officer of the Court. The defendants can seize any funds in their possession belonging to the plaintiff, and apply them against this debt. It appears that income from the trust fund established for her benefit is now payable to the plaintiff. The defendants are entitled to appropriate a sufficient amount of such income to satisfy the debt for taxed party and party costs payable by the plaintiff to them.

Barlow J. states that on the hearing before him "counsel for all parties appeared to be quite content to have the party and party costs satisfied out of the trust fund income, to which Edythe G. Lamport is entitled." The same position was taken by counsel on the hearing before this Court.

Barlow J. directed, "that the trustees' costs and expenses should be borne by the Edythe G. Lamport trust." The appellant contends that the difference in amount between the solicitor and client costs as taxed and the party and party costs should be paid out of the residue of the estate and not from the "Lamport trust funds".

The general rule in the matter of trustee's costs is well established: "they are entitled to full indemnity out of the trust estate against costs, charges, and expenses not improperly incurred": *Smith v. Beal* (1894), 25 O.R. 368, per Meredith J. at p. 382. See also *Worrall v. Harford* (1802), 8 Ves. 4, 32 E.R. 250; *In re Llewellyn; Llewellyn v. Williams* (1887), 37 Ch. D. 317 at 327; *In re Estate of Plant; Wild v. Plant*, [1926] P. 139 at 155, 156; Underhill, *Law of Trusts and Trustees*, 9th ed., pp. 465, 468, cited by Barlow J. The rule is also stated clearly by Lord Cottenham L.C. in *Attorney-General v. Mayor of Norwich* (1837), 2 My. & Cr. 406 at 424, 40 E.R. 695, in these words: "I apprehend it to be quite clear, according to the rule which applies to all cases of trust, that if necessary expenses are incurred in the execution of a trust, or in the performance of the duties thrown on any parties, and arising out of the situation in which they are placed, such parties are entitled, without any express provision for that purpose, to make the payments required to meet

those expenses out of the funds in their hands belonging to the trust." It may be noted too that The Trustee Act, R.S.O. 1937, c. 165, s. 32, expressly provides that "A trustee . . . may reimburse himself or pay or discharge out of the trust property all expenses incurred in or about the execution of his trust or powers."

I think it is plain that the costs of the proceedings in defence of the action commenced by Edythe G. Lamport, and subsequent appeals by her, were properly incurred by the defendants. It was the duty of the defendants to defend themselves and the residuary estate against the claims made in the litigation. While there is a charge of breach of duty there is no finding of such breach or misconduct in the execution by the defendants of their trusts. The guiding principle to determine whether a trustee is entitled to indemnity against loss, including costs of proceedings in court, is whether the action was "for the benefit of the trust estate": *Walters v. Woodbridge* (1878), 7 Ch. D. 504; *In re Dunn; Brinklow v. Singleton*, [1904] 1 Ch. 648. Jessel M.R. in *Walters v. Woodbridge*, *supra*, at p. 509, states the rule thus: ". . . where an action is brought against a trustee in respect of the trust estate, whether it be an action of ejectment, trespass, or of any other description, and is defended by the trustee, not for his own benefit, but for the benefit of the trust estate, he is entitled to indemnity." Jessel M.R. continues: "Here the defence by the trustee was for the benefit of the trust estate; it is true that at the same time he defended his own character, but that was merely an incident. . . . The defence of his character, therefore, does not make the defence less a defence on behalf of the trust estate." James L.J., at p. 510, says: "his defence was beneficial to the trust estate, for it has been decided that the compromise was an advantageous one. In such a case it is impossible to split the defence, and say that because the trustee at the same time defended his own character he is only to have a part of the costs."

The same principle which determines when liability lies for costs incurred by a trustee applies likewise to determine where such liability lies. The principle that a trustee is entitled to indemnity in respect of expenses properly incurred in the execution of his trust is founded in equity. The estate which derives the benefit from the proceedings prosecuted or defended by the trustee ought to bear the expense of them. It would be in-

equitable, unfair and unreasonable to impose the costs and expense of litigation conducted for the benefit of one estate or fund upon some other estate or fund. The right to indemnity is enforceable against the trust estate in respect of which the trustee has incurred the debt or liability: *Elliott v. Canadian Credit Men's Trust Association, Limited*, [1935] S.C.R. 1, per Duff C.J. at page 2 ([1935] 1 D.L.R. 353, 16 C.B.R. 120).

Barlow J. says, "The whole action was with respect to the Edythe G. Lamport Trust." In a limited sense this statement is correct, but with great respect the real nature of the litigation is not given proper effect. The very essence of the action was to impeach the agreement made between the beneficiary Edythe G. Lamport and the executors of the will of the deceased. Had the action succeeded the residue of the estate would have been directly and adversely affected. The costs incurred in the defence of the proceedings were not for the benefit of the Edythe G. Lamport trust fund, but on the contrary were for the sole purpose of maintaining the residue of the estate and for the benefit of the residuary legatees. The case must not be confused with one in which a legacy has been severed from the bulk of an estate and becomes the subject of litigation. In such a case, if a dispute arises "between the persons to whom, or some of whom, the legacy belongs, and the Court has to decide to whom it belongs, there the particular fund bears the costs", but in the case presently under consideration the contest must be regarded as one between a legatee and the estate itself: *Attorney-General v. Lawes* (1849), 8 Hare 32 at 43, 68 E.R. 261.

Regarded in this way, the defendants incurred the debt or liability on behalf of the residuary estate and not for the benefit of the Edythe G. Lamport trust fund. The executors are therefore entitled to indemnity out of the residue of the estate and not out of the corpus of the Lamport trust fund. It follows that the executors are entitled to recoup themselves out of the residue of the estate for the difference in amount between the solicitor and client costs and the party and party costs of the proceedings.

There is another reason which, in my opinion, makes it wrong now to direct payment of the solicitor and client costs out of the Lamport trust fund. The Court in the exercise of its discretion awarded the defendants costs against the plaintiff. Those costs are taxable and payable as between party and party. There is

no principle upon which an order could be justified directing the plaintiff to pay to the defendants the amount of their solicitor and client costs: *Patton v. Toronto General Trusts Corporation et al.*, [1930] A.C. 629 at 639, 39 O.W.N. 5, [1930] 4 D.L.R. 321, [1930] 3 W.W.R. 1. An order which now directs payment of solicitor and client costs out of the Lamport trust fund indirectly imposes an obligation on the plaintiff Edythe G. Lamport which could not properly have been imposed in the proceedings.

Counsel for the appellant argues that only one set of solicitor and client costs should be allowed. I agree with Barlow J. that this argument must fail. The defendants were justified in separating their defences, and are each entitled to be indemnified the costs properly incurred by them.

Counsel for the assignees of certain beneficiaries appeared on the hearing of the appeal and submitted argument that a priority for payment exists in their favour. I doubt whether the question properly comes before the Court as part of the particular application for the opinion, advice and direction of the Court made by the executors. Nevertheless I add my view in complete agreement with Barlow J. that the law "is well settled that the charges and expenses of a trustee are a first charge on all trust property, both income and corpus, and that an assignee who takes an assignment from a legatee or beneficiary takes such assignment at his own risk, and furthermore, that such assignee can acquire no higher rights than those of the legatee or beneficiary." See *Stott v. Milne* (1884), 25 Ch. D. 710 at 715; *In re Knapman*; *Knapman v. Wreford* (1881), 18 Ch. D. 300 at 304, cited by Barlow J.

My conclusion is that it ought to be found that the solicitor and client costs of the executors, over and above the party and party costs (which latter costs are payable out of the income of the Edythe G. Lamport trust), shall be paid out of the capital of the residue of the estate of the deceased, and the executors ought to be authorized to raise sufficient funds out of the said capital to pay the same, together with the costs of all parties on the application to Barlow J. and on this appeal, the costs of the executors in such proceedings to be as between solicitor and client.

Appeal allowed.

Solicitors for Edythe G. Lamport, appellant: Lamport, Ferguson and Co., Toronto.

Solicitors for the executors and trustees, respondents: Day, Ferguson, Wilson & Kelly, Toronto.

Solicitors for the assignees, respondents: Hughes, Agar, Thompson & Amys, Toronto.

[MACKAY J.]

Local 100, United Steel Workers of America v. Steel Company of Canada Limited.

Constitutional Law—Subject-matters of Legislation—Validity of The Collective Bargaining Act, 1943 (Ont.), c. 4—Applicability to War Industries—The Industrial Disputes Investigation Act, R.S.C. 1927, c. 112—The British North America Act, ss. 91, 92, 94.

The Collective Bargaining Act, 1943 (Ont.), c. 4, in its pith and substance deals with property and civil rights within the Province, and does not fall within any of the enumerated powers given by s. 91 of The British North America Act exclusively to the Dominion. It is not in conflict with The Industrial Disputes Investigation Act, R.S.C. 1927, c. 112, and its validity is therefore not affected by the successive Orders in Council, passed under The War Measures Act, R.S.C. 1927, c. 206, extending the applicability of The Industrial Disputes Investigation Act.

A PROCEEDING for certification of the applicant as collective bargaining agency for the employees of the respondent. The reasons for judgment are reported in part only. Those parts of the reasons which deal with particular questions as to the right to certification, the effect of the vote taken, etc., will be found set out in full in [1944] O.W.N. 281.

The application was heard by MACKAY J. in the Labour Court at Toronto.

F. A. Brewin, for the applicant.

G. R. Munnoch, K.C., and *D. G. Guest*, for the respondent.

G. A. Gale, for Independent Steel Workers' Association, intervener.

C. R. Magone, K.C., for the Attorney-General for Ontario.

Robert Forsyth, K.C., for the Attorney-General for Canada.

J. L. Cohen, K.C., *amicus curiae*.

6th April 1944. MACKAY J. [after setting out the earlier proceedings]:—Subsequent to the taking of the vote, the respondent company applied to the Court for leave to amend its reply to the statement of facts of the applicant, so as to raise

certain issues concerning the constitutional validity of The Collective Bargaining Act, 1943 (Ont.), c. 4, and its application to the undertaking of the respondent company at its Hamilton works. The contentions were: (1) that The Collective Bargaining Act is *ultra vires* the Legislature of the Province of Ontario, and (2) that the said Act is *ultra vires* to the extent to which it may be read or construed to apply to the undertaking of the respondent company at its Hamilton works, 90 per cent. of the production of which consists of munitions of war and supplies within the meaning of Order in Council P.C. 3495, dated November 7, 1939 (73 Can. Gaz. 1752, 1 Proc. & Orders 170), as amended by P.C. 1708, dated March 10, 1941 (4 Proc. & Orders 63), which undertaking thereby became subject to the provisions of The Industrial Disputes Investigation Act, R.S.C. 1927, c. 112, and to the following Orders in Council:

P.C. 3495/1939, as amended, *supra*;

P.C. 4020, dated June 6, 1941 (4 Proc. & Orders 169), as amended by P.C. 4844, dated July 2, 1941 (5 Proc. & Orders 28), P.C. 7068, dated September 10, 1941 (5 Proc. & Orders 151), P.C. 496, dated January 19, 1943 ([1943] 1 C.W.O.R. 226), and P.C. 4175, dated May 20, 1943 ([1943] 2 C.W.O.R. 426);

P.C. 7307, dated September 16, 1941 (75 Can. Gaz. 995, 5 Proc. & Orders 171), as amended by P.C. 8821, dated November 13, 1941 (75 Can. Gaz. 1819, 5 Proc. & Orders 281).

Leave was granted by me, and the Attorneys-General of the Dominion of Canada and the Province of Ontario were given notice pursuant to s. 32 of The Judicature Act, R.S.O. 1937, c. 100, and they were represented on the argument. On 29th March 1944, counsel appeared before me and made certain submissions as to the effect of Orders in Council P.C. 1003 of February 17, 1944 ([1944] 1 C.W.O.R. 439) and P.C. 1982 of March 20, 1944 ([1944] 1 C.W.O.R. 639) upon the jurisdiction of the Labour Court to deal with this application.

The first contention of the respondent calls for an inquiry whether The Collective Bargaining Act in pith and substance falls within a head of the legislative power in s. 92 of The British North America Act, 1867, and, if so, whether it also falls within any of the enumerated powers in s. 91. What then is the pith and substance, the main purpose and object of The Collective Bargaining Act? The terms of the Act show that its purpose was to give legal protection to what have commonly been

acknowledged to be the rights of labour, namely, the right to organize freely, and the right to bargain collectively. Thus it declares, in s. 2(2), that employees may form, join, assist, select or designate any collective bargaining agency for the purpose of bargaining collectively with their employers. It protects the freedom of organization by the ancillary provisions set out in ss. 7, 8 and 9 of the Act, and it makes collective bargaining mandatory, by s. 6. However, whatever the moral or social obligation of the employer to bargain collectively may be, the legal obligation which arises under the Act is confined to bargaining with a collective bargaining agency representing a majority of the employees in an appropriate bargaining unit, and machinery is set up to determine and certify whether the bargaining agency enjoys the requisite support. It is unnecessary at this late date to reiterate the principles which govern the interpretation of ss. 91 and 92 of The British North America Act. Legislation of the character found in The Collective Bargaining Act falls within the exclusive authority of the Province to enact legislation in relation to property and civil rights in the Province, and it is clear from the case of *Toronto Electric Commissioners v. Snider et al.*, [1925] A.C. 396, [1925] 2 D.L.R. 5, [1925] 1 W.W.R. 785, that such legislation, save where it is confined to industries within the exclusive jurisdiction of the Dominion, is not within any of the enumerated powers of the Dominion Parliament set out in s. 91 of The British North America Act; see also *In re Legislative Jurisdiction over Hours of Labour*, [1925] S.C.R. 505, [1925] 3 D.L.R. 1114; *Attorney-General for Canada v. Attorney-General for Ontario et al.*, [1937] A.C. 355, [1937] 1 D.L.R. 684, [1937] 1 W.W.R. 312; *The Tolton Manufacturing Co. Limited et al. v. The Advisory Committee for the Men's and Boys' Clothing Industry for the Province of Ontario*, [1940] O.R. 301, [1940] 3 D.L.R. 383, 74 C.C.C. 252; [1942] O.R. 518, [1942] 3 D.L.R. 705, 78 C.C.C. 191, affirmed [1943] O.R. 526, [1943] 3 D.L.R. 474, 80 C.C.C. 99. No doubt the evils which The Collective Bargaining Act was designed to cure prevail in other Provinces besides Ontario, but legislative jurisdiction to cure them does not on that account vest in the Dominion Parliament: *Attorney-General for Ontario v. Attorney-General for the Dominion et al.*, [1896] A.C. 348, C.R. [11] A.C. 222, 5 Cart. 295.

It was contended by counsel for the respondent that The Collective Bargaining Act cannot be regarded as legislation in relation to property and civil rights in the Province because, while there were "some substantive rights", nevertheless, "in the field of collective bargaining, no right has been conferred, because no one was constituted who was competent to receive that right or to exercise or enforce it." It is axiomatic that civil rights may be created by the Legislature of the Province. The argument of the respondent ignores entirely the fact that the very legislative power of the provincial Legislature in relation to property and civil rights is available to confer juristic personality upon an entity which did not possess that personality at common law, and to endow it with legal capacities. That is the very thing that The Collective Bargaining Act has done. By s. 13 of the Act, the Legislature has provided that a collective bargaining agency may in certain circumstances apply to the Court. By s. 1(c), "collective bargaining agreement" is defined as "an agreement in writing between an employer and a collective bargaining agency", and s. 14 provides that any party to a collective bargaining agreement, which of course includes a collective bargaining agency, may apply to the Court. Reference may also be had to ss. 16, 17, 19 and 20 of the Act. To say that these provisions fail to constitute an entity with legal personality is to deny all rules of statutory interpretation: see *The Taff Vale Railway Company v. The Amalgamated Society of Railway Servants*, [1901] A.C. 426. The mere fact that, in certain circumstances, the Act may have granted to such entities immunity from suit (s. 3) does not destroy that personality.

It has been argued by counsel for the respondent, in the alternative, that, even though The Collective Bargaining Act may be held to be a valid exercise of provincial legislative authority, nevertheless it conflicts with existing competent legislation of the Dominion Parliament, namely, The Industrial Disputes Investigation Act, R.S.C. 1927, c. 112, as extended by the several Orders in Council referred to earlier, which were enacted under the authority of The War Measures Act, R.S.C. 1927, c. 206. An examination of the provisions of The Industrial Disputes Investigation Act and of The Collective Bargaining Act discloses that the two statutes are separate and distinct, and can consistently operate side by side. As Lord Haldane and Hodgins J.A. pointed out in the *Snider* case, *supra*, The Industrial Dis-

putes Investigation Act is essentially a sedative measure. Its machinery begins to operate only when a dispute has arisen between an employer and any of his employees: see ss. 6 and 16(2). It is not the purpose of The Industrial Disputes Investigation Act to provide protection for freedom of association and collective bargaining, although that result may follow in some cases if there is an appropriate recommendation of a board of conciliation and investigation appointed under the Act and the parties see fit to accept the recommendations of the board. The prime purpose of The Industrial Disputes Investigation Act is to prohibit strikes and lockouts for a period of time while a board of conciliation is looking into the matter, in the hope that cooler counsel may prevail. If I am correct in my view that The Industrial Disputes Investigation Act and The Collective Bargaining Act can operate side by side, there is nothing in P.C. 3495/1939, or the amendments to this Order, which alters the situation, because they merely amplify the application of The Industrial Disputes Investigation Act; they retain the same machinery, and it works in the same way, but they merely give to that Act a broader scope. The whole scheme of the federal legislation leaves untouched the operation of The Collective Bargaining Act. This line of reasoning also eliminates Order in Council P.C. 7307/1941 and its amendments. None of these Orders, either individually or as a general scheme (looking at the matter from the point of view of *Attorney-General for Alberta v. Attorney-General for Canada, et al.*, [1939] A.C. 117, [1938] 4 D.L.R. 433, [1938] 3 W.W.R. 337) can in any way affect the operation of The Collective Bargaining Act. In view of these considerations, it is unnecessary to discuss the application of s. 94 of The British North America Act to this legislation.

In so far as P.C. 4020, of 6th June 1941, is concerned, only s. 5 of that Order may not be covered by what has already been said. There may be some conflict between that provision and the provisions of s. 7 of The Collective Bargaining Act, but I am not called upon to deal with that question. Indeed, even if s. 7 of The Collective Bargaining Act were inapplicable to war industries (as defined by P.C. 3495/1939), that would not affect the validity of The Collective Bargaining Act as a whole. However, there is little ground for questioning the validity even of that section of the Act, since, as I pointed out earlier, it is part of a group of sections which are ancillary to the main

purposes of the Act. My conclusions, then, are that The Collective Bargaining Act in its pith and substance constitutes a valid exercise by the Province of its exclusive legislative jurisdiction in relation to property and civil rights in the Province, that such legislation does not normally fall within any of the heads of legislative jurisdiction committed exclusively to the Dominion, and finally, leaving aside for the moment any consideration of Order in Council P.C. 1003, of 17th February 1944, that the Dominion has not, by virtue of any of the Orders in Council referred to above, passed pursuant to The War Measures Act, occupied the field in which The Collective Bargaining Act operates. It is unnecessary for me to consider the effect upon The Collective Bargaining Act, of P.C. 1003 of 17th February 1944, as brought into operation by P.C. 1982 of 20th March 1944, in view of the further Order in Council, P.C. 2301, of 30th March 1944 ([1944] 2 C.W.O.R. 10), passed by the Dominion Government in pursuance of its powers under The War Measures Act, which declares that "The Wartime Labour Relations Regulations, P.C. 1003 of February 17, 1944, shall not affect the jurisdiction of The Labour Court of Ontario under The Ontario Collective Bargaining Act, 1943, Chapter 4, Statutes of Ontario, 1943, with respect to any proceedings pending in the said Court on March 20, 1944."

[The judgment then proceeds to discuss certain other questions arising in connection with the proceedings, in no way connected with the constitutional question. The concluding paragraphs of the judgment are set out *verbatim* in [1944] O.W.N. 281].

Applicant certified.

Solicitors for the applicant: McRuer, Mason, Cameron & Brewin, Toronto.

Solicitors for the respondent: Blake, Anglin, Osler & Cassels, Toronto.

Solicitors for the intervener: Byrne & Dixon, Hamilton.

[URQUHART J.]

**The Bayer Company Limited v. Farbenfabriken vorm Fried.
Bayer and Co. et al.**

Contracts—Termination—Effect of Outbreak of War upon Contract with Enemy National—Exceptions to General Rule—Contract Not Involving Intercourse with or Aid to Enemy—Obligation to Pay Money.

Although the general rule is that the outbreak of war automatically dissolves an executory contract previously made with a person residing in the hostile state, there are exceptions to this rule. One of the exceptions, which seems to be well established, is in the case of contracts which do not involve aid to, or intercourse with, the enemy. Since, under the Regulations Respecting Trading with the Enemy, made under the authority of The War Measures Act, R.S.C. 1927, c. 206, all moneys payable under a contract with an alien enemy are automatically payable to the Custodian, an obligation to pay money to an enemy national does not necessarily involve intercourse with the enemy, or aid to him, and is accordingly not terminated by the outbreak of war.

War Measures—Property and Rights of Alien Enemies—Position and Powers of Custodian—The War Measures Act, R.S.C. 1927, c. 206—Regulations Respecting Trading with the Enemy.

At common law the Crown has the right, in time of war, to confiscate the property of enemy subjects, with the result that it can compel payment to it of all debts and obligations due to an enemy. But although this right still exists, it must be taken to be superseded by the Regulations Respecting Trading with the Enemy, made under the authority of The War Measures Act, R.S.C. 1927, c. 206. The Custodian, appointed under these Regulations, is not in the position of a trustee for an enemy alien. The enemy is removed from control and beneficial ownership of the property in question, and there is no beneficial owner until the conclusion of the war.

AN action to set aside two contracts. The facts, and the nature and grounds of the relief sought, are fully stated in the reasons for judgment.

7th March 1944. The action was tried by URQUHART J. without a jury at Windsor.

J. H. Rodd, K.C., and G. L. Rodd, for the plaintiff.

G. L. Fraser, K.C., for the defendant, The Secretary of State of Canada, Custodian.

26th April 1944. URQUHART J.:—Action by the plaintiff for a judgment cancelling certain agreements made by the plaintiff company with the two German defendants (a) because of alleged failure on the part of the defendants to perform certain obligations thereunder; and (b) because the contracts were, as alleged, dissolved as and from the 10th day of September 1939, because of a state of war existing between Canada and Germany.

The defendant companies (hereafter called the German companies) did not appear or put in a defence. Indeed it is very doubtful if they know anything about this action.

The writ was issued on 6th April 1943, against two German companies and the Secretary of State for Canada in his capacity of Custodian of alien property in Canada. On 12th April 1943, counsel for the plaintiff secured from the Junior Judge of the County of Essex, in his capacity of Local Judge of this Court, an order permitting substitutional service personally upon the general manager or other executive officer of a Bayer Company in Buenos Aires, described as agent for the defendants, the German companies, and by mailing to the defendant companies in care of the Ambassadors or other political representatives of Germany in the same place. Six weeks (an inadequate time, in my opinion) was given to these companies to appear.

I question the method of service at such a time as this, but as the Custodian has appeared and defended and put forward everything that could be said, in my opinion, to support the contracts in question, no harm has been done to the defendants by my going on with the case.

At the opening of the trial a motion was made by the plaintiff on the pleadings, which motion I reserved. As evidence has now been called, and substantially the same points are involved after evidence as before, the disposition of the plaintiff's case will also include disposition of the motion.

At the opening also, the Custodian asked leave to amend his statement of defence by adding certain paragraphs and amending others. I reserved judgment on these, but have now considered same. I allow the amendment to paras. 2 and 5, and also the addition of a new para. 10, although it is not, in my opinion, in the correct form of a plea of estoppel. I disallow the addition of a new para. 11, on account of delay; of a new para. 12 as being unnecessary; and of a new para. 13 for reasons stated above.

The facts are not in dispute. As the German companies have not appeared, and as no evidence was offered in contravention of the alleged supplying by one of them of defective materials, I am taking the evidence of Mr. Schade, an old friend of long standing, in whom I have the greatest confidence, as to the defective raw materials supplied by one of the German companies, to be correct.

The plaintiff company entered into a contract (Ex. 1) on 9th April 1923 with the first of the German companies, whose name

appears in the above style of cause. It is a very elaborate contract, carefully drawn, I assume in England.

I do not think that a great deal depends upon the terms of this or the subsequent agreement to be referred to. In the preamble it recites that the plaintiff has certain trade marks, including the words "Bayer" and "Aspirin" and the Bayer cross mark, and it indicates that there is litigation pending in Canada concerning the same. The German company agrees not to contest or put in issue those trade marks, and to help the plaintiff to defend the same. It agrees also not to sell to others or import into Canada any of the products mentioned in the agreement, and to use its best efforts to prevent such. The result is that Canada and Newfoundland are given to the plaintiff as exclusive markets. Then the contract provided that if the plaintiff wished it might buy certain specified products from the German company, but the plaintiff was under no compulsion to deal with that company. Such products were to be sold at cost by the German company.

The plaintiff agreed for fifty years to pay to the German company one-half of the net profits (*i.e.*, of the amount available for dividends each year, one-half would go to the German company, and one-half might be distributed). The contract would in the ordinary course of events continue until 1973.

On 15th November 1926, a new agreement was entered into between the second of the defendant German companies and the plaintiff. The second German company has a very long name, but it is known throughout the world by a contracted name, "I. G. Farben", which has become notorious the world over. This company is the result of the amalgamation of several German companies, and the new agreement merely confirms, with some slight variation, and vests in I. G. Farben, the old contract. So that from then on the dealings of the plaintiff were with the second German company.

In deciding this case, it is difficult for one to put aside prejudice, having in mind the nature of the I. G. Farben corporation and the nefarious effect it has had in connection with the present conflict. It has been likened to an octopus with its tentacles spread out not only to all European countries, but also into the United States and other parts of the western hemisphere. It has been described by Vicki Baum in her great novel "The Weeping Wood" as "the throne of the Kingdom of Ersatz". What part

it has played in the war, and in fact in causing the war, can be left to one's imagination.

On the other hand one must not take into consideration that if the contract be not set aside, and the moneys continue to be paid to the Custodian, they may become available as reparation to compensate Canadians for the considerable amount of this country's property which is sure to be destroyed when the enemy, finding the game is up, retires to his own country.

On the other hand, the services of this great firm will be needed by the world after the war when the threads of international trade and commerce have to be taken up again.

Although these speculations are interesting, they are beside the point, and, putting them aside, it seems that the problem resolves itself into a question of law.

The plaintiff company, from the inception of these contracts up to 1936, bought its basic ingredient for Aspirin, acetylsalicylic acid, hereinafter called "ASA", from the defendants. This came from Germany in barrels, and as the years went on the quantities imported and used became greater and greater.

According to Mr. Schade, up to 1936 the product so imported was satisfactory, but in the latter part of 1936, the plaintiff received a shipment of adulterated product, containing, among other things, wood splinters, aluminum particles, talc and rust, and after attempting to use some by the tedious process of hand-picking to separate the good from the bad, without success, it had to return upwards of 50,000 pounds. This went on into 1937, but finally the plaintiff had to discontinue buying from I. G. Farben. Thenceforth it had to procure its basic ingredient from its parent company in the United States, which manufactures its own ASA. The product of the American company is as good as the German product was before 1936, but that imported from Germany would cost about 25 per cent. less.

Complaints in the form of letters (Ex. 3) were made, and replies were received. The defendant German company made an investigation of samples returned and came to the conclusion that the impurities might have gotten into the product subsequent to manufacture, and suggested a change in the metal barrels in which they were shipped. They suggested changes in shipping and promised to pay particular attention to same in the future.

The net result is that in regard to ASA there have been no purchases since 1937, but in regard to other products covered by the contract, there were dealings up to the outbreak of war.

The explanation given was not accepted by the plaintiff as satisfactory, and the German company made no efforts to force any ASA upon the plaintiff. The plaintiff had hopes of some time getting better ASA, and that continued up to the outbreak of the war, after which there were, of course, no shipments from Germany of any kind under the contract, all products having been secured since then from the parent company at Albany, New York. I. G. Farben at no time refused to supply ASA. The complaint was that they did not give the proper product.

Since the making of the contracts, and including the years 1937 and 1938, the plaintiff paid one-half the net profits to I. G. Farben, but before the 1939 profits became returnable the Custodian stepped in, and since then large sums, in six figures, have been paid to the Custodian.

It was admitted by Mr. Schade that the words "Aspirin" and "Bayer" were vital to the plaintiff, and that it was important to it to have the whole of the territory guaranteed to it under the contract.

In regard to the first ground alleged by the plaintiff, I cannot see that the delivery of a product such as is described would be such as would justify the Court in declaring the contract rescinded.

The test now applied, according to 7 Halsbury, 2nd ed., p. 225, is "whether the particular stipulation goes to the root of the matter, so that failure to perform it would render the performance of the rest of the contract by the party in default a thing different in substance from what the other party has stipulated for, or whether it merely partially affects it and may be compensated for in damages." See *The Mersey Steel and Iron Co. (Limited) v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434 at 443.

The breach must go right to the root of the contract. In this case the breach, while a large one, is not one which goes to the root of the contract, in my opinion. There was no refusal by I. G. Farben to ship the product. It contended that the difficulty could be overcome with better supervision and care. There was no obligation on the part of the plaintiff to buy any of the products named from I. G. Farben.

The plaintiff, from 1937 to the outbreak of war, had never asked it to supply these goods. It, however, in the years that remained before the war, treated the contract not as void on account of the faulty shipments, but as still subsisting. The plaintiff still continued to buy other products (of lesser importance, it is true), and thus still treated the contract as being in effect. It can hardly, at this late date (six years from alleged imperfect shipments to the date of the writ), ask the Court on that account to rescind the contract.

This brings us to the principal ground upon which rescission is sought, *viz.*, that this is an executory contract which is automatically dissolved by law on the outbreak of war.

The general rule is set out in 7 Halsbury, 2nd ed., p. 261, para. 360: "The effect of an outbreak of war upon a contract that has been previously made with a person residing in a hostile State is that if the contract is executory it is avoided, and both parties are released from performance; if, however, the contract was executed at the time when the war began, its validity is not affected, but the remedy upon it is suspended during the continuance of the war and revives when peace is restored."

There is some doubt in my mind as to whether these contracts could be classed as executed or executory contracts. Halsbury, in his definition of consideration in its aspect of executory or executed, says (vol. 7, p. 139, para. 198): "Consideration is said to be executed when it consists in some act or forbearance on the part of the promisee completed at the time when the promise is made; when it consists in a promise on his part to do or forbear from doing some act in the future, it is called executory."

In this particular case both sides have still something to do or forbear. I. G. Farben has for one thing to forbear from shipping any of the products mentioned in the contract into Canada, except on the order of the plaintiff. It has also to use its best efforts to prevent such being done by others. It has to supply on demand. The plaintiff company has to pay for such forbearance each year.

I must conclude therefore that the contract is executory.

There are, however, exceptions to the general rule of automatic dissolution. The subject is discussed in Rogers, *The Effect of War on Contract*, 1940. At p. 118, the author points out the

exceptions, which he classifies in two groups: (1) contracts affecting property; (2) executory contracts of such a nature that their continuance in no way benefits or involves intercourse with the enemy during the war: *Ertel Bieber and Company v. Rio Tinto Company, Limited*, [1918] A.C. 260; *Seligman v. Eagle Insurance Company*, [1917] 1 Ch. 519.

As soon as an individual or company acquires an enemy character, all intercourse with him in that character, whether commercial or otherwise, is prohibited, and almost all executory contracts to which he is a party are dissolved, as above set forth.

It is also clear that until a war has actually commenced there can be no such thing as an alien enemy, and that commercial transactions are permissible up to the very commencement of the war. See *Janson v. Driefontein Consolidated Mines, Limited*, [1902] A.C. 484, where the Earl of Halsbury L.C. said at p. 494: ". . . it would be, to my mind, to introduce a new principle into our law to hold that the probability of a war should have the same operation as war itself. It is war and war alone that makes trading illegal." In that case it was shown that the Transvaal had for years been storing arms and munitions for the war which broke out a few days after the cause of action in this case arose.

In the *Rio Tinto* case, *supra*, the House of Lords recognized that there are exceptions to the general rule that executory contracts are dissolved. At p. 269, Lord Dunedin, presiding, said:

"There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey et al. v. Lowenfeld*, [1916] 2 K.B. 707. In other words, the executory contract which is abrogated must either involve intercourse, or its continued existence must be in some other way against public policy as that has been laid down in decided cases."

This case is thus the basis of the principles which Rogers has set forth above.

The leading case of *Esposito v. Bowden* (1857), 7 E. & B. 763, 119 E.R. 1430, was approved also in the above case. The *Rio Tinto* case involved a contract for the shipment by instalments of copper, from English-owned mines in Spain, to German nationals, made before the outbreak of the Great War. Another case, *Orconera Iron Ore Company (Limited) v. Fried Krupp Aktiengesellschaft* (1918), 34 T.L.R. 307, had reference to the supply of iron from Bilbao in Spain to Germany during the last war. The *Esposito* case involved a charter-party to carry Russian goods from Odessa, and soon after its formation the Crimean War broke out between Great Britain and Russia. In the *Esposito* case, at p. 779, Willes J., delivering the judgment of the Court, said:

"It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the Crown, is illegal."

In a footnote at p. 793 of the 1858 Philadelphia edition of 7 E. & B., it is said, referring to a number of American decisions:

"It is a well settled doctrine in the English courts . . . , that there cannot exist at the same time, a war for arms and a peace for commerce. The war puts an end at once to all dealing and all communication with each other." The statement further recognizes that there may be exceptions. It is obvious that the above case occurs very early in the body of law on the subject of dissolution of contracts.

A large number of the many cases referred to by counsel, which I have read, refer either to charter-parties for the shipping of enemy goods, or to the supplying of goods which could be turned into munitions for the effective prosecution of the war against our country.

The present case, so far as the plaintiff is concerned, involves merely the payment over of money once a year. Of course money, either in the form of foreign exchange or specie, if it could reach Germany, would be of the greatest assistance to it in its conduct of the war.

The validity or otherwise of the contract must be determined as at the outbreak of war. No one can foresee the probable duration of a war. In fact after four and one-half years of the

present war it is impossible for us to say that the end of the war is even in sight, much less to determine the probable date of termination.

One can see, also, that there may be a distinction between contracts for supplying goods like copper, food-stuffs and other potential war materials, and those involving merely the payment of money. The former things are useless unless they are delivered to the enemy in specie. Therefore the contract for the delivery of the same necessarily would involve intercourse with, contact with, and benefit to, an enemy.

The mere payment of money stands to my mind on a different footing. It may not always involve these considerations.

As I have said, to effect a dissolution of an executory contract, it must involve intercourse with the enemy, or the continued existence of the contract must be against public policy, but where the contract involves neither intercourse with nor benefit to the enemy in its continuance, it will not be affected or dissolved: *Distington Hematite Iron Company, Limited v. Possehl & Co.*, [1916] 1 K.B. 811.

The case of *Seligman v. Eagle Insurance Co.*, *supra*, is interesting, and to some extent helpful. An alien had two policies on his life with an English company, and mortgaged them by assignment to secure a loan. He and certain sureties covenanted with the company to repay the loan and to keep up the premiums. After the war broke out, one of the sureties paid the premiums from time to time as they became due in order to keep the policies up. The company accepted these premiums with certain reservations. Later the surety tendered the amount of the mortgage and claimed an assignment of the policies to him, which the company refused to give without similar reservations.

It was held that the policies were not voided merely because the insured became an alien enemy; that payment to and receipt by the company of premiums did not involve illegal intercourse with an enemy, and that the surety was entitled to an assignment of the policies without any reservation. In his reasons for judgment, Neville J., at p. 525, quotes with approval the following words of Warrington L.J. in *Halsey v. Lowenfeld*, *supra*, at p. 716:

"If an act for its performance necessitates the concurrence of the other party, the promisee, and that involves unlawful

intercourse with the alien, the latter would be discharged from his obligation."

From the foregoing cases it seems to me that the exceptions set forth in Rogers are well established, and it may be that there is a further distinction between contracts involving contact with the enemy in the shipping and furnishing of goods and those contracts which, as in the case of landlord and tenant, insurance and other subjects, involve the payment of money only and do not involve any necessity for communication with the alien for his further concurrence in regard to the payments under the contract.

We must now turn to consider whether these contracts are executory contracts of such a nature that their continuance in any way benefits or involves intercourse with the enemy during the war under the circumstances of the case, and whether they come within the class of exceptions that are not dissolved by war.

On 5th September 1939 (two days after Britain was at war with Germany but while Canada was not) an Order in Council, P.C. 2512 (73 Can. Gaz. 795, 1 Proc. & Ord. 38) was passed by virtue of the power vested in the Governor in Council by The War Measures Act, R.S.C. 1927, c. 206, with the view of regulating trading with the enemy and the treatment of enemy property, enacting certain regulations described as Regulations Respecting Trading with the Enemy (1939). In these regulations an enemy is defined.

"Commencement of the present war" is also defined, although no state of war then existed between Germany and His Majesty the King in his capacity of King of Canada, but a state of war existed between Germany and His Majesty the King in his capacity of King of Great Britain.

On 8th September 1939, Order in Council P.C. 2586 (73 Can. Gaz. 808, 1 Proc. & Ord. 48) was passed. It recites the order above referred to, P.C. 2512/1939, and enacts certain further regulations, some of which are of importance herein.

S. 1A provides that during the period from 2nd September 1939 until Canada declares war on the German Reich (the period being called a period of apprehended war) the Regulations enacted by P.C. 2512 shall be deemed applicable. Although no state of war existed before 10th September 1939, between Canada and Germany, yet, because Britain was at war with Germany, it

became obvious that Canada would in a few days follow her example, and provision was being made for such eventuality. The Regulations, therefore, became operative as against German nationals as of 2nd September 1939, and therefore before war actually broke out between Germany and Canada.

S. 24 of the Regulations (P.C. 2512) thus becomes of some importance. It reads as follows:

"24(1). All property, rights and interests in Canada belonging at the commencement of the present war to enemies and whether or not such property, rights and interests have been disclosed to the Custodian as required by these Regulations are hereby vested in and subject to the control of the Custodian.

"(2). This Regulation shall be a vesting order and shall confer upon the Custodian all the rights of the original enemy holder, including the power of selling, managing and otherwise dealing with such property, rights and interests as he may in his sole discretion decide."

In this section, "enemy" includes a sovereign state at war with His Majesty and by s. 3A(a), added by P.C. 2586, the expression "the German Reich" is substituted for "any State or sovereign of a State at war with His Majesty". But by s 3A(b), the words "period of apprehended war" are substituted for the words "present war" and like expressions in the principal Regulation.

As to the words "property, rights and interests", I would give them a very wide meaning. Also by s. 39 of the original Regulations, they are deemed to include "all real and personal property of every description, including debts, credits and accounts." I would think the meaning would be much wider, but at any rate the right of I. G. Farben to receive half of the annual net profits would in my opinion come also within this section. It may also be covered by ss. 1(e) and 1(f).

The Regulations have been from time to time amended, and in the amendment of 1940 (P.C. 3959, 74 Can. Gaz. 757), an extended definition of property was set out in s. 1(h), and it includes "all real and personal property of every description, and all rights and interests therein, whether legal or equitable, and without restricting the generality of the foregoing, including securities, debts, credits, accounts and choses in action." While this widens the definition to a certain extent, the former definition is wide enough for our purposes.

By s. 23(1) of the 1939 Regulations, the Secretary of State is appointed to receive, hold and preserve the property, rights and interests as the case may be and he is called for that purpose "The Custodian".

The salient sections above mentioned, including that about the period of apprehended war, are continued by the 1940 Regulations, and although the above mentioned Regulations are repealed, continuity is preserved by the substituted Regulations.

By s. 34(1) of the original Regulations, continued in later Regulations, it is provided that payment by the debtor to the Custodian shall discharge the debtor from the obligation.

On 13th November 1943, the present Regulations were substituted by Order in Council P.C. 8526 ([1943] 4 C.W.O.R. 713) for previous Regulations. In these Regulations a new clause is added, by s. 7(2), to the effect that "No person shall bring, take or continue against an enemy in any court in Canada an action or other proceeding of any kind whatsoever unless such person has obtained the written consent of the Custodian."

This action was commenced on 12th April 1943, and the statement of defence was delivered on 30th September 1943. Though the defendant Custodian, at the commencement of the trial, asked for extensive amendments to his statement of defence, this point was not raised, although the new Regulation had been in force for a considerable length of time. Mr. Fraser mentioned the section in his argument, but did not stress it. I assume that the Custodian would have granted his consent readily to continue an action already at issue at the time of the new Regulation, and as he did not plead the defence, he may be taken to have waived the lack of consent.

The War Measures Act, above referred to, and the present Regulations, set forth the position of the Custodian. In regard to his position Rogers, at p. 119, says:

"Now that all enemy property and rights are liable to be vested in the custodian of enemy property, who we shall see holds them for the enemy owner subject to such arrangements as may be made in the peace treaties, there is all the more reason for not extending the scope of the common law rule [*i.e.* the rule as to dissolution of executory contracts]."

In England the office of custodian was set up first in 1914, and again in 1939 an order setting up the office of custodian was made.

In times of war the Crown had the right to confiscate property of enemy subjects: *Porter v. Freudenberg*, [1915] 1 K.B. 857 at 869. In that case Lord Reading C.J., delivering the judgment of the Court, said: ". . . under the ancient common law, 'debts and goods found in this realm belonging to alien enemies belong to the King and may be seized by him': see Hale's Pleas of the Crown, vol. 1, p. 95."

This power also extended to choses in action, with the result that the Crown could compel payment to it direct of all debts and obligations due to an enemy. However, after the last war, in the case of *In re Ferdinand, Ex-tsar of Bulgaria*, [1921] 1 Ch. 107, the Court of Appeal in England held that the above right existed, but that the powers in the Trading with the Enemy Acts were so inconsistent with the exercise of the common law right of forfeiture that that right must be treated as being thereby temporarily superseded.

As was said by Lord Sterndale M.R., quoting with approval the words of Bankes L.J. in *Hugh Stevenson & Sons, Limited v. Aktiengesellschaft für Cartonnagen-Industrie*, [1917] 1 K.B. 842 at 852:

" . . . the whole of the legislation which has been passed since the beginning of the war dealing with enemy property in this country rests on the assumption that the Crown is not insisting on any common law right to claim such property."

The Custodian, therefore, derives his authority from the Act and the Regulations to which I have referred above. The position of the Custodian is not that of a trustee of property for an enemy alien: *In re Münster (Enemy)*, [1920] 1 Ch. 268. The enemy is merely removed from control and beneficial ownership of the property during the war, and until the war is disposed of by His Majesty, on the conclusion of peace, there is no beneficial owner of his property at all.

In the words of Younger J. in *In re Ling & Duhr, Enemies*, [1918] 2 Ch. 298 at 300, referring to the Trading with the Enemy Act (Imp.), "its main purpose is to create a fund to be protected and preserved . . . with a view to such arrangements after the war as may seem good to His Majesty in Council".

In *In re Shawaga Estate; Bogucki v. Custodian of Enemy Property*, [1943] 2 W.W.R. 188 at 193, [1943] 4 D.L.R. 610, Mackenzie J.A., rendering the judgment of the Court, also sets out the position of the Custodian in the following terms:

"The Custodian derives his authority from the regulations made under the *War Measures Act*, R.S.C. 1927, ch. 206. By sec. 3 of that Act the Governor in Council is empowered to make such orders and regulations as he may by reason of the existence of war 'deem necessary or advisable for the security, defence, peace, order and welfare of Canada.' By par. (f) thereof such power is specifically extended to: 'Appropriation, control, forfeiture and disposition of property and of the use thereof.'

"The office of Custodian of Enemy Property is created and his authority defined by the regulations made under the said Act, such regulations being given the force of law under subsec. (2) of said sec. 3.

"Referring then to the regulations, we find that No. 6 provides that the Secretary of State for Canada is appointed, 'to receive, hold, preserve and deal with such property rights and interests as may be paid or vested in him,' pursuant thereto of which he is designated 'the Custodian', while Regulation No. 21 says:

" '(1) All property in Canada belonging to enemies at or subsequent to the commencement of the present war and whether or not such property has been disclosed to the Custodian as required by these regulations is hereby vested in and subject to the control of the Custodian.

" '(2) This regulation shall be a vesting order and shall confer upon the Custodian all the rights of such enemies including the power of dealing with such property in such manner as he, in his sole discretion, decides.'

"According to Regulation 1(b) (ii) the term 'enemy' is to be construed to include 'any person who resides within territory occupied by a state or sovereign for the time being at war with His Majesty.'

"From the foregoing provisions of the Act and regulations it seems to us clear that the Custodian has been appointed and the properties of the enemies of our country, defined as above, have been vested in him, not that he may exercise the powers conferred upon him as representative, or on behalf, of the enemy holders thereof, such as those in Poland in this case, but in order that he may deal with them for the 'welfare' or benefit of Canada in its prosecution of the war."

Under the Regulations, moneys due to an alien enemy, or which but for the war would be due, must be paid to the Cus-

todian, and the result of the Regulations and of payment to him prevents any benefit going to the enemy, and no intercourse with the enemy is involved, the payments going on automatically to the Custodian.

The result is as follows:

(1) The contract is one with a German company.
(2) Up to the commencement of the war, there was nothing to prevent the carrying out of such a contract.

(3) While Great Britain was at war with Germany by 3rd September 1939, Canada was not at war with her until 10th September 1939.

(4) By the Regulations enacted on 5th September, P.C. 2512, 1939, property in such a contract had passed to and vested in the Custodian as of 2nd September.

(5) Therefore when war broke out there was no contract with an alien enemy of a kind on which a state of war would operate to bring about dissolution.

(6) Because of the Regulations there need not be payment to or communication with an enemy.

(7) Therefore the contract comes within the second exception above mentioned (and perhaps within the first), and is not dissolved by a state of war between Germany and Canada.

There is another matter I should mention. The plaintiff was very slow in bringing its action. It allowed nearly four years to go by without moving. I cannot see however that the doctrine of estoppel comes into play, if indeed it is correctly pleaded. If it does, that would be still another reason for denying the plaintiff relief.

During the argument counsel for the plaintiff also dealt with the question of frustration.

"Frustration can only be pleaded when the events and facts on which it is founded have destroyed the subject matter of the contract, or have, by an interruption of performance thereunder so critical or protracted as to bring to an end in a full and fair sense the contract as a whole, so superseded it that it can be truly affirmed that no resumption is reasonably possible.

"It is a mistake to say that the doctrine of frustration is a hard and fast doctrine which can be applied as a general principle in a definite measure to all cases alike. The facts and circumstances of each particular contract, as well as the nature and duration of the interruption to performance must all be

taken into account." *Mayer & Lage Inc. v. Atlantic Sugar Refineries Ltd.*, 58 O.L.R. 531 at 535, [1926] 2 D.L.R. 783, quoting Lord Shaw in *Lord Strathcona Steamship Company, Limited v. Dominion Coal Company, Limited*, [1926] A.C. 108 at p. 114.

With the view I take of the matter, as above set forth, I do not think that the question of frustration arises in connection with this contract under all the circumstances. Indeed, the point was but faintly pressed.

On the question, of frustration, the words of Viscount Haldane in *F. A. Tamplin Steamship Company, Limited v. Anglo-Mexican Petroleum Products Company, Limited*, [1916] 2 A.C. 397, are of assistance. The common object of the agreement must be frustrated, not merely an individual advantage which one side or the other may have gained from it. *Hirji Mulji et al. v. Cheong Yue Steamship Company, Limited*, [1926] A.C. 497 at 507.

The real point argued and stressed in the present case is the question as to whether or not the contract is dissolved by war, and I do not think the doctrine of frustration is of avail to the plaintiff. The point is a very difficult one, but finding as I have set forth above, the action, and therefore the motion, must be dismissed. This dismissal will, under the circumstances, be without costs.

Action dismissed without costs.

*Solicitors for the plaintiff: Rodd, Wigle, Whiteside & Jasper-
son, Windsor.*

*Solicitor for the Secretary of State of Canada, defendant:
Gordon L. Fraser, Windsor.*

[HOGG J.]

Famous Players Canadian Corporation Limited v. Hamilton United Theatres Limited.

Companies—Voting—Approval of Sale of Assets—Shareholders, Originally Present at Meeting, Withdrawing before Taking of Vote—The Companies Act, R.S.O. 1937, c. 251, s. 24(m).

In determining whether a proposed sale of the assets of a company has been authorized by a vote of "the shareholders present or represented by proxy . . . and holding not less than two-thirds of the issued capital stock represented at such meeting", as required by s. 24(m) of The Companies Act, R.S.O. 1937, c. 251, the crucial time is that at which the vote is taken, and what is essential is that the vote in favour of the resolution should amount to two-thirds of the shares represented at that time. Shareholders who attend the meeting, but withdraw before the vote is taken, are no more entitled to be counted in this determination than shareholders who do not attend at all, and consequently if shareholders do so withdraw they, and the shares they represent, are to be ignored in determining whether or not the required majority has voted in favour of the resolution. *Commonwealth v. Vandegrift* (1911), 232 Pa. St. 53; *Re Dairy Corporation of Canada Limited*, [1934] O.R. 436, considered.

A MOTION to continue an interim injunction. The facts are fully stated in the reasons for judgment.

13th April 1944. The motion was heard by HOGG J. in Weekly Court at Toronto.

J. M. Bullen, K.C., for the plaintiff, applicant.

C. F. H. Carson, K.C., and *B. V. Elliot*, for the defendant, *contra*.

28th April 1944. HOGG J.:—This is a motion to continue, until the trial or other disposition of the action, an interim injunction granted on 11th April 1944, on the application of the plaintiff, restraining the defendant from carrying into effect any sale of the assets of the defendant company purporting to have been authorized by the shareholders of the company at a special general meeting for that purpose held on 3rd April 1944.

The plaintiff contends that certain of the provisions of s. 24(m) of The Companies Act, R.S.O. 1937, c. 251, were not complied with at the aforesaid meeting and that, therefore, the vote taken at such meeting upon the resolution purporting to authorize the sale was of no effect and was void, and, as a consequence, the said sale was not authorized by the shareholders of the defendant company.

After the chairman had declared the meeting to be duly called and regularly constituted, scrutineers were appointed to report upon the number of shareholders present in person and

upon the number of shares represented by proxy. It is agreed by counsel that the following are the facts regarding the shares of the company represented by shareholders present or by proxy at the meeting at various times, as well before, as at, the time a vote was taken upon the resolution and amendment thereto: There were 44,834 shares of the company represented at the meeting before the withdrawal from the meeting of any of the shareholders. During the progress of the meeting one shareholder representing 5,004 shares left the meeting before a vote on an amendment to the resolution to authorize the sale, which was first put to the meeting. There then remained at the meeting shareholders holding 39,830 shares. Subsequent to the vote on the amendment, and before the vote on the resolution to authorize the sale, a number of shareholders, who represented in all 10,597 shares, withdrew from the meeting. There then remained at the meeting shareholders representing 29,233 shares when the vote on the resolution in question was taken.

The vote upon the resolution to authorize the sale was: 28,574 shares for the resolution, 214 shares against the resolution, making a total of 28,788 shares which were voted. Shareholders, at the meeting when the voting took place, representing 445 shares, did not vote.

That part of s. 24(m) of the Ontario Companies Act which is material to the issue, reads:

"sell or dispose of the undertaking of the company . . . if authorized so to do by the vote of the shareholders present or represented by proxy, at a general meeting duly called for considering the matter, and holding not less than two-thirds of the issued capital stock represented at such meeting".

Before its amendment by 1930, c. 37, s. 24 and 1933, c. 7, s. 3, the subsection read:

"by the vote of a majority in number of the shareholders present or represented by proxy, at a general meeting duly called for considering the matter, and holding not less than two-thirds of the issued capital stock of the company."

It was argued by Mr. Bullen on behalf of the plaintiff that the section means that to enable the resolution to be passed at the meeting, either two-thirds of the total issued capital stock of the company must be represented, or, in the alternative, that shareholders who had been at the meeting and who withdrew before the vote was taken, together with those who were present

when the vote was taken but who did not vote, as well as those who voted, must all be taken into account in order to ascertain who were present as contemplated by the statute and in fixing the number of shares represented at the meeting, and that the two-thirds of the shares to be represented at the meeting must comprise at least two-thirds of the total shares represented by all of the said shareholders, although a number of them were not at the meeting when the vote was taken. Mr. Bullen contends that as there were at one time at the meeting, before the vote was taken on the resolution in question, shareholders representing 44,834 shares, these shareholders and this number of shares must be taken into account in arriving at the meaning of the words "shareholders present or represented by proxy, at a general meeting" and of the words "of the issued capital stock represented at such meeting."

Two-thirds of 44,834 shares amounts to 29,890 shares. Two-thirds of the 39,830 shares represented after the withdrawal of the 5,004 shares is 26,554 shares. Two-thirds of the 29,233 shares represented at the meeting after the withdrawal of the 10,597 shares, and represented at the meeting during the taking of the vote, is 19,489 shares. If the total number of shareholders who were actually present at the meeting when the vote was taken and who were able, therefore, to vote on the resolution, whether they did vote or not, are considered to be the shareholders "present or represented by proxy" and if the "two-thirds of the issued capital stock represented as such meeting" is two-thirds of the stock represented by such shareholders, the provisions of the subsection were complied with as the resolution was carried and passed by a majority of 28,360 shares.

The problem which is presented for solution is, what meaning must be given to the words "vote of the shareholders", also the words "present or represented by proxy, at a general meeting" and the words "represented at such meeting"?

In an endeavour to interpret, or to discover the meaning of, the language of an Act of Parliament, "Words are primarily to be construed in their popular sense, and as they would have been understood the day after the statute was passed, unless such construction would lead to manifest absurdity. . . . As a word is primarily to be construed in its literal and popular sense, so an enacting section is to be understood according to the ordinary meaning of the words composing it": 27 Halsbury, Laws

of England, 1st ed., pp. 134-5 (see 2nd ed., vol. 31, pp. 480-1). The same rule is stated in other language in Craies on Statute Law, 4th ed., p. 151: "Critical refinements and subtle distinctions are to be avoided, and the obvious and popular meaning of the language should, as a general rule, be followed." Possibly this primary principle of interpretation cannot be expressed more succinctly than in the words of Lord Tenterden in *Attorney-General v. Winstanley* (1831), 2 Dow & Cl. 302 at p. 310, 6 E.R. 740, in the House of Lords: ". . . when we look at the words of an Act of Parliament, which are not applied to any particular science or art, we are to construe them as they are understood in common language."

The authorization by the shareholders of the sale of the assets of a company must be signified by a vote of the shareholders; that is, by an actual physical act being performed by the shareholders, namely, the act of voting. Those who are actually at the meeting have the opportunity to vote and are capable of voting, even if they do not do so. Those who have left the meeting are not present for the purpose for which the meeting was called, for they have placed themselves in such position that they are physically unable to vote. The whole purpose for which the meeting in question was called was to enable the shareholders of the company to signify whether or not they approved of the sale. The section contemplates that this approval or disapproval can only be shown by a vote, but the shares represented by those who had left the meeting before the vote was taken were not shares which could have been made use of in so far as a vote is concerned because they could not have been voted, and although these shares were represented at the meeting at one time, they were not represented at the meeting at the critical time, one might say the statutory time, that is, when the vote was taken. I think it is the shareholders who were present at the meeting when the vote was taken, and it is the number of shares represented by them, that the subsection contemplates. I do not think the meaning and intent of the section can be, having regard to the literal and ordinary sense of its language, that an offer for the purchase of the assets of a company can be rejected by the action of a body of shareholders who go to a meeting and are recorded as present as to themselves and the shares held by them in person or by proxy, and who then leave the meeting before the vote on the very

object for which the meeting was called is taken. The authorization or disapproval of the sale can only be signified, according to the statute, by a vote of shareholders.

In *Commonwealth v. Vandegrift* (1911), 232 Pa. St. 53, in the Superior Court of Pennsylvania, on appeal, the question was considered whether at a meeting of the shareholders of a company there was a quorum present. Mr. Justice Elkin delivered the judgment of the Court, and said, at p. 60: "When the meeting convened, 1,887 shares out of 2,081 were represented in person or by proxy. This was 846 shares more than were required to constitute a quorum. A majority of all the stock issued being represented, it was clearly the duty of those present to organize the meeting and proceed with the election. This was done. The president called the meeting to order and directed the secretary to note those present and the number of shares represented either in person or by proxy. . . . Without objection from anyone the meeting proceeded to elect a chairman by a *viva voce* vote. . . . After the chairman had been thus declared elected, one of the appellants requested that a new election by stock vote be held. The chairman announced that the request came too late, as the meeting had already been organized . . . the stockholder who made the request stated that if a new election of a chairman by stock vote was not allowed, the faction represented by him would withdraw for the purpose of breaking a quorum and to prevent any further business being transacted. In accordance with the suggestion made they did withdraw and refused to participate in the election of a board of directors at that meeting. Before withdrawing they were notified that the election of directors would be by stock vote. After their withdrawal, the meeting having already been organized, those stockholders who remained proceeded in a regular and orderly manner with the election." And at p. 61: "The case therefore turns upon the question of the right of the appellants to withdraw from the annual meeting under the circumstances hereinbefore referred to for the purpose of breaking a quorum. Fortunately, we are not left in the position of groping our way in the dark for an answer, but have the light of credible authority as our guide." The learned judge then cites a number of authorities, the judgments in which are to the effect that those who voluntarily absent themselves from a meeting duly called for an election must recognize the validity of an election held by those who do

attend. He further says: "Stockholders who attend a meeting and then without cause voluntarily withdraw are in no better position than those who voluntarily absent themselves in the first instance." And at p. 62: "When they [the stockholders] . . . without sufficient cause withdrew, they are not in position to complain about the acts of those who remained and performed their duties in a regular and lawful manner."

Counsel for the plaintiff considered the case of *Re Dairy Corporation of Canada Limited*, [1934] O.R. 436, [1934] 3 D.L.R. 347, as being perhaps the principal authority in support of his contention. In this case s. 8(2) of c. 46 of the 1931 Ontario statutes, now s. 64(2) of the Ontario Companies Act, respecting a compromise or arrangement of a company with its creditors, was under consideration. The material words of that section, in so far as the interpretation of that section is of value in the present case, are: "If the shareholders or class of shareholders, as the case may be, present in person or by proxy at the meeting, by three-fourths of the shares of each class represented agree to the compromise or arrangement", etc. The word "vote" is not used in the section. It can be conceived that an agreement might be reached without a vote being taken, as for example by each shareholder signing a consent. The judgment in this case is of assistance, although the language of the section differs from that of the section now under consideration. The scrutineers reported that there were 13,753 shares present at the meeting. The vote showed 9,948 for the motion and 3,127 against the motion, and that the discrepancy of 678 shares "can only be accounted for by supposing that this number of shares were not voted." Middleton J.A. said, at p. 439: "Those who do not vote, in effect vote against the resolution." And again, at p. 440, he said: "Upon these figures, if driven to decide upon these figures alone, I would be inclined to decide that it had not been shown that the resolution was passed by the required statutory majority." The judgment would seem to indicate that only those present when the vote was taken, whether they voted or not, were taken into account in order to fulfil the requirements of the statute. It is argued by counsel for the plaintiff that this judgment means that the three-quarters of the shares required are those represented at the meeting at the time of voting, together with the shares represented by any

shareholders who may previously have left the meeting. However, there is no mention of any shareholder leaving before the vote, and the learned judge speaks of the passing of the resolution by "the statutory majority", indicating by the word "majority" that the essential time at which three-quarters of the shares were to be represented at the meeting was at the time of the taking of the vote.

McLaren v. Thomson, [1917] 2 Ch. 261, which was cited to me on the argument, is not in point as the judgment, which is on the question whether proxies for use at an original meeting of shareholders of a company were to be considered good at an adjourned meeting, turns entirely upon the terms of the articles of association of the company.

I am of the opinion that the terms of s. 24(m) of The Companies Act were fulfilled as to the shareholders required to be present or represented by proxy and as to the number of shares required to be represented at the meeting with respect to the resolution to authorize a sale of the defendant's assets, voted upon at the meeting of the defendant company. The matter in issue in this motion is of considerable difficulty, and possibly the Legislature, in a further amendment to the section, would re-draft it in language as to the meaning of which, and as to the intention of the Legislature, there would be no doubt.

I received much aid from the able arguments presented by counsel on the motion. I have been unable to find any case in which this subsection of the Act has been considered. Those cases cited to me upon the argument, except the *Dairy Corporation* case, *supra*, dealt with the construction of sections of other statutes respecting the determination of matters at company meetings, but were not of very much assistance, as the language of each of such sections differs not only one from another but from the section now under consideration, as, for example, those referring to The Companies' Creditors Arrangement Act, 1933 (Dom.) c. 36, where the words of s. 5, providing for a vote of shareholders, read: "present and voting either in person or by proxy at the meeting."

Counsel for the defendant company asked that the motion be turned into a motion for judgment, as was done in *Wilson v. Town of Ingersoll* (1916), 38 O.L.R. 260.

After careful consideration I have concluded that the injunction should be dissolved and the action should be dismissed with costs, including costs of this motion.

Motion and action dismissed with costs.

Solicitors for the plaintiff, applicant: McMaster, Montgomery, Bullen, Steele, Robertson & Willoughby, Toronto.

Solicitors for the defendant, respondent: Borden, Elliot, Sankey & Kelley, Toronto.

[COURT OF APPEAL.]

Blackstone v. The Mutual Life Insurance Company of New York.

Discovery—Production of Documents—Privilege—Documents Obtained in Contemplation of Litigation—Limits of Privilege—Medical Examinations of Insured Claiming Disability Benefits.

The plaintiff, in May 1941, claimed certain disability benefits which were provided for in life insurance policies issued by the defendant. He submitted medical certificates with his claim, but the defendant requested him to submit to examination by Dr. O. Dr. O. examined the plaintiff in August and November 1941, and in January 1942 the defendant commenced payment of the disability benefits, making up all benefits accrued since the onset of the disability, in May 1941. In October 1942, at the defendant's request, the plaintiff was again examined, this time by Dr. R. Both doctors had reported to the defendant after making their examinations. In November 1942 the defendant ceased payment of disability benefits, and this action was brought in November 1943. In its affidavit on production the defendant claimed that the reports of both Dr. O. and Dr. R. were privileged from production, as having been obtained for the assistance of the defendant's legal advisers in any litigation that might follow the disallowance of the plaintiff's claim. The plaintiff disputed the privilege asserted, and the Court examined the documents pursuant to Rule 349.

Held. Dr. O.'s report was not privileged, and must be produced, but Dr. R.'s report was within the privilege asserted (KELLOCK J.A. dissenting as to Dr. R.'s report).

Per ROBERTSON C.J.O. and GILLANDERS J.A.: Dr. O.'s report was obtained in the course of an ordinary investigation, and it could not be said that when it was obtained litigation was contemplated. The mere possibility that there might be litigation, and the fact that in that event the report would be important to the defendant's solicitors, was not sufficient. An entirely different situation existed, however, when the defendant, having for some months recognized the plaintiff's claim, started a new investigation. At that time the defendant might well anticipate a dispute and litigation.

Per KELLOCK J.A.: For privilege to exist in the case of communications between a party and a non-professional agent or third person, two conditions must co-exist: (1) the documents must be obtained at the request or suggestion of the party's solicitor, or, without such request or suggestion, for the purpose of being laid before him for his advice or assistance; and (2) they must be for the purposes of litigation, existing, contemplated, or anticipated. The claim of privilege as set out in the affidavit did not disclose more than a possibility of litigation developing, and was therefore not sufficient.

AN appeal by the defendants, by leave of Rose C.J.H.C., from the order of Plaxton J., ordering the production of certain documents for examination by the plaintiff's solicitors. The following statement of facts is taken from the reasons for judgment of GILLANDERS J.A.:

"The plaintiff respondent is the assured in various life insurance policies issued by the appellant company, which contain, *inter alia*, provisions for certain benefits (waiver of premiums and monthly payments) in case the insured becomes totally and, presumably, permanently disabled. The respondent claimed, as a result of some heart ailment or attacks, to have become so disabled within the provisions of the policies on 21st May 1941, and in due course submitted to the appellant certain material as 'due proof' of such disability. The appellant thereafter requested that he submit to medical examination by Dr. John Oille, heart specialist. This the respondent did on 22nd August 1941, and again on 10th November 1941. Dr. Oille made reports of these examinations to the appellant. In January 1942, the appellant allowed and paid the respondent the benefits provided for total disability as and from the date claimed, that is 21st May 1941, and continued to pay these benefits until November 1942, when it discontinued, and subsequently disclaimed liability therefor. In October 1942, at the appellant's request, the respondent submitted to a further medical examination by Dr. H. E. Rykert, also a heart specialist in Toronto, and later, in May 1943, at the appellant's further request, submitted to an exhaustive examination by Dr. White, a medical man in Boston, Massachusetts. In November 1943, the respondent brought this action in respect of the disability benefits which the appellant had discontinued in November 1942.

"The appellant, in its affidavit on production, made by its assistant secretary, objects to produce the reports of the medical examinations mentioned, claiming that they were 'written, prepared or obtained for the purpose of giving information to the Defendant's attorneys in New York so as to enable them to give their professional advice as to the rights of the parties under the policies listed in the Statement of Claim herein and for the assistance of such attorneys and any Canadian solicitors retained by them in any litigation that might follow the disallowance of the Plaintiff's claim for disability benefits under such policies and are therefore privileged.'

"The respondent moved for production of the reports, and Plaxton J. made an order for the production of the reports made by Dr. Oille and Dr. Rykert, but not those of Dr. White. The defendant, after obtaining leave from the Chief Justice of the High Court, appeals to this Court. The respondent does not cross-appeal in respect of the reports of Dr. White."

2nd May 1944. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and KELLOCK JJ.A.

H. C. Walker, K.C., for the defendant, appellant: The plaintiff voluntarily submitted to the examination by Dr. Oille. He was not bound to do so, but was entitled, under the policies, to decide what was "due proof", and to stand or fall on that. This examination was made before we admitted any liability. It falls within the privilege set out in 10 Halsbury, 2nd ed., pp. 385-387. The points at issue are: (1) whether the reports were in fact obtained for submission to attorneys or solicitors; and (2) whether they were obtained for the purposes of contemplated litigation.

[ROBERTSON C.J.O.: Under the old practice, the words of the affidavit on production were conclusive. To what extent has that been altered?] The amendment of Rule 349, in 1941, permits the Court to inspect the documents, but production should be ordered only if there is something in the documents themselves which shows the claim of privilege to be unfounded.

We do not contend that these documents came into existence only for the purpose set out above, but that was one of the purposes, and that is sufficient. [ROBERTSON C.J.O.: Were not both parties operating under the contract, without any contemplation of litigation, until the claim was actually rejected?] I submit not. The privilege arises at the time when the company rejects the "due proof" submitted by the insured, and asks for something more. We did not reject the claim in words, but we indicated clearly by our actions that we were not satisfied. If the investigation had any purpose at all, it was to establish a ground for rejecting the claim, and this might lead to litigation. There is a line of cases saying that litigation is in contemplation, or anticipated, from the instant that an accident happens which may possibly be due to negligence. Here we say that litigation can be anticipated from the moment that we do not accept and act upon the claim as filed. [ROBERTSON C.J.O.: Surely it can-

not be anticipated until you receive a report from your own examiner, disagreeing with the claim made.]

[KELLOCK J.A.: After receiving Dr. Oille's report, your clients paid. Does that not destroy any claim of privilege?] No, because the privilege depends, not upon the contents of the document, but upon the purpose for which it was obtained. If a document is privileged when it is obtained, that privilege cannot be destroyed by the fact that the litigation then in contemplation does not in fact take place. [GILLANDERS J.A.: Surely when this first examination was made there had been no rejection of the proof or the claim. The company merely requested a further examination, and the insured co-operated.] But privilege does not depend on whether or not the parties were co-operating. It is the time at which, and the purpose for which, the document came into existence that determines the existence of privilege.

This privilege is an extension of that protecting communications between solicitor and client, and is based upon the same grounds.

As to Dr. Rykert's report, it came into existence at a time when the company was actually paying benefits. Surely the mere request for another examination in those circumstances shows that litigation is contemplated, and litigation did in fact follow the disallowance of the claim.

F. Erichsen-Brown, K.C., for the plaintiff, respondent: The general rule is that all documents which may throw any light on the matters in issue must be produced, and privilege is one of the established exceptions to that rule.

The documents here in question did not in fact pass to legal advisers. Had they supported only the defendant's case, there might have been some other ground of privilege, but payments were not discontinued until two months after the receipt of Dr. Rykert's report, and therefore even it cannot have been entirely favourable to the defendant's present position. What was done in obtaining Dr. Oille's report is the ordinary practice of insurance companies.

This litigation was not "contemplated" until November 1943. Everything before that was a mere friendly arrangement, and the documents have nothing whatever to do with this litigation. [GILLANDERS J.A.: How can we ascertain the purpose of these documents, in view of the wording of the affidavit?] Plaxton J.

inspected them under Rule 349, which was proper: *Birmingham and Midland Motor Omnibus Company, Limited v. London and North Western Railway Company*, [1913] 3 K.B. 850 at 856, 858. His determination should not be interfered with.

The appellant, to sustain its position, must say that litigation is to be anticipated every time a claim is made under such a policy. The position is entirely different from that in actions based upon tort or wrong-doing. Such cases as *Pacey v. London Tramways Company* (1876), 2 Ex. D. 440, are distinguishable.

H. C. Walker, K.C., in reply.

Cur. adv. vult.

5th May 1944. ROBERTSON C.J.O.: This is an appeal, by leave of the Chief Justice of the High Court, from the order of Plaxton J., dated 21st April 1944, whereby, on the application of the plaintiff in the action, the defendant was ordered to produce for the inspection of the plaintiff's solicitors certain documents referred to in the second part of the first schedule of the affidavit on production of the defendant, as to which documents the defendant claimed privilege.

The action is brought upon certain policies of insurance issued by the defendant to the plaintiff, each of which policies contained a provision for certain benefits in case the plaintiff should become totally and permanently disabled before reaching the age of 60 years. The plaintiff claimed that he had become entitled to the benefits so provided, having become totally and, presumably, permanently disabled, within the intent and meaning of the policies, and the plaintiff furnished the defendant with what he claims was due proof of his disability. This alleged proof was furnished on or about 21st May 1941. The defendant did not at once admit its liability, but pursued certain inquiries, with the result that some months later—on or about 21st January 1942—the defendant made payment of disability benefit income and waived payment of premiums for the period commencing on 21st May 1941. There are documents for that period for which the defendant claims privilege.

The defendant continued to waive payment of premiums, and to pay disability benefit income to the plaintiff, until 21st November 1942, at which time the defendant ceased to waive premiums and to pay disability benefit income, and refused such waiver and payment thereafter. There are documents within

the period from 21st January 1942 to 21st November 1942 as to which the defendant also claims privilege. The present action was commenced on 2nd November 1943.

The affidavit on production of the defendant is made by the assistant secretary, who says that as such he has knowledge of all documents which are or have been in the custody or possession of the defendant relating to the matters in question in this action, and that he is cognizant of the matters in question in this action. It is not necessary that I should set out the somewhat lengthy paragraphs in which the grounds of the defendant's objection to produce the documents now in question are stated. As to most of the documents the objection is, substantially, that they were written, prepared or obtained for the purpose of giving information to the defendant's attorneys to enable them to give their professional advice as to the rights of the parties under the policies, and for the assistance of such attorneys and any Canadian solicitors retained in any litigation that might follow the disallowance of the plaintiff's claim.

In the course of argument the case of *Birmingham and Midland Motor Omnibus Company Limited v. London and North Western Railway Company*, [1913] 3 K.B. 850, was referred to, and it was agreed that this also is a case where the Court may properly examine the documents in question under Rule 349, for the purpose of forming an opinion, from such inspection, of the validity of the defendant's claim of privilege.

We have since examined the documents, and, in my opinion, such of the documents as belong to the period ending with 21st January 1942 ought to be produced for inspection by the plaintiff's solicitors. As to documents of later date for which privilege is claimed, in my opinion the claim of privilege is valid and should be upheld.

I agree with the proposition of the defendant's counsel that it is not essential to the validity of the claim of privilege that the document for which privilege is claimed should have been written, prepared or obtained solely for the purpose of, or in connection with, litigation then pending or anticipated. It is sufficient if that was the substantial, or one of the substantial, purposes then in view.

I do not think that can be said of the earlier documents, as to which I think there is no privilege. The plaintiff claimed

that he was afflicted with a heart condition, and his claim was supported by medical opinion. The defendant desired to investigate his condition further, and, no doubt, there were difficulties in diagnosis. The plaintiff co-operated in these further investigations, which involved physical examination and questioning of the plaintiff, and the taking of X-ray pictures. The question was a medical, and not a legal question. No doubt, if matters proceeded as far as litigation the contents of the documents in question would be important to the defendant's solicitors in that litigation. Equally, however, privilege might be claimed by an insurer for the insured's application for the issue to him of the policy. Litigation may arise in which the contents of the application will be important, but I think no one would say the application was obtained with a view to litigation.

In a case such as the present it would not be in accord with the attitude usually taken by insurance companies of the standing of the defendant, in making inquiries of the character disclosed in the documents in question, to relate them to anticipated litigation. That stage had not been reached. Many years ago a Chief Justice of the Court of Appeal of this Province spoke of the "arts, by which a certain class of insurance companies aim at combining the collection of premiums with the non-payment of losses": *Ballagh v. The Royal Mutual Fire Insurance Company* (1880), 5 O.A.R. 87, per Moss C.J.A. at p. 90. That class of insurance company is, I think, practically extinct, and it is commonly the practice of insurance companies to investigate the claims of their insured with a fair and open mind, and not to anticipate litigation until they have ascertained whether or not there is any basis for it. There is nothing to indicate any expectation of litigation in the documents of which I think production should be made. An entirely different situation existed when, having for some months recognized the plaintiff's claim, a new investigation was started.

I would allow the appeal of the defendant, except as to the documents in the earlier period.

Success being divided, costs here and below, including costs of the motion for leave to appeal, should be costs in the cause.

GILLANDERS J.A. [after setting out the facts as above]:—The general rule is that every document in the possession or power of either party which is material or relevant to the case

or matter must be produced unless it is covered by some established privilege: *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, at 656; *Jones v. Great Central Railway Company*, [1910] A.C. 4.

One type of established privilege applies to professional communications of a confidential character, and this is true irrespective of whether litigation was contemplated or pending at the time. I am of opinion the material here does not fall within the special type of documents privileged from production even if no litigation was pending or contemplated at the time: *Minet v. Morgan* (1873), L.R. 8 Ch. 361; *O'Shea v. Wood*, [1891] P. 286; *Mostyn v. The West Mostyn Coal and Iron Company (Limited)* (1876), 34 L.T. 531; *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675 at 682; *Clergue v. McKay et al.* (1902), 3 O.L.R. 478; *Ainsworth v. Wilding*, [1900] 2 Ch. 315; *Mahony et al. v. The National Widows' Life Assurance Fund (Limited)* (1871), 24 L.T. 548; *Lee v. Hammerton* (1864), 10 L.T. 730.

Privilege, however, would extend to reports and documents of this nature if obtained when litigation was contemplated or pending. See *Wheeler v. Le Marchant*, *supra*. Commenting on the above case in *Kennedy v. Lyell* (1883), 23 Ch. D. 387, Cotton L.J. observes, at p. 407: ". . . but all that was decided was that communications between the solicitors and the surveyor of the client before any litigation was contemplated were not protected." See also discussion of this case by Stirling J. in *Learoyd v. Halifax Joint Stock Banking Company*, [1893] 1 Ch. 686. Were these reports or either of them obtained in contemplation of litigation? At the time the respondent filed with the appellant his material submitted as "due proof" of his disability, and the appellant requested that he submit himself to Dr. Oille for medical examination, it could not be said in the ordinary case, nor is there anything in the material to indicate, that litigation was contemplated. One can readily understand in case of a disability claim of this nature resulting from some heart condition that it was desired by the appellant company to have the most careful and competent examination to satisfy them whether or not their assured should receive the disability benefits provided by his contract. There is, of course, always the possibility of litigation developing, but in a situation of this kind I cannot think, nor does the affidavit on production say, that litigation was at that time in contemplation.

Among the various meanings of "contemplation" given by Murray's New English Dictionary that might be applicable are, "prospect, expectation, purpose, intention" and of the phrase "in contemplation", "in view (as a contingency looked for, or as an end aimed at)".

In claims in tort against an alleged wrong-doer, it may well be that litigation can be anticipated from the outset or from the moment a claim is made: *Pacey v. London Tramways Company* (1876), 2 Ex. D. 440. I cannot think that that should be taken to be the attitude of the appellant company in respect of their assured under the circumstances here.

In the carefully drawn affidavit on production it is said that the reports were obtained, among other reasons, for the assistance of such attorneys and Canadian solicitors retained by them in any litigation that might follow the disallowance of the plaintiff's claim.

The case is close to the line, but I incline to the view that litigation could not be said to be in contemplation, and was no more than a mere possibility, at the time the respondent was asked to see Dr. Oille. Under these circumstances I think the general rule must apply, and that the report made by Dr. Oille should be produced.

The same result does not follow in the case of the examination by Dr. Rykert. The appellant had paid disability benefits for some time, but apparently, in October 1942, when the examination by Dr. Rykert was requested, was not satisfied that the respondent was entitled to the continuance of the benefits he was receiving. If its course of conduct may be looked at from this point on, it assists in the conclusion that at the time the Rykert report was requested, and subsequently, it anticipated a dispute and litigation. This report is, therefore, privileged from production.

The order should be amended accordingly. Success being divided, the disposition of costs should be as ordered by my Lord.

KELLOCK J.A. (*dissenting in part*):—This is an appeal by the defendant from the order of Plaxton J., dated 21st April 1944, requiring the defendant to produce the reports of certain physicians who examined the respondent in the circumstances mentioned in the judgment of my brother Gillanders.

In order that these documents be privileged from production, two conditions must co-exist: The documents must be (1) made in answer to inquiries made by a party as the agent for or at the request or suggestion of his solicitor, or without any such request but for the purpose of being laid before a solicitor or counsel for the purpose of obtaining his advice or of enabling him to prosecute or defend an action or prepare a brief; and (2) for the purposes of litigation existing, or in contemplation, or anticipated. I refer to 10 Halsbury, 2nd ed., pp. 386-7; *Birmingham and Midland Motor Omnibus Company, Limited v. London and North Western Railway Company*, [1913] 3 K.B. 850.

In the affidavit on production in question in the case at bar, privilege is claimed on the ground "That the documents in the bundles marked 'A' and 'B' and the x-ray photographs or laminograms dated 22nd August, 1941, and 27th October, 1942, were written, prepared or obtained for the purpose of giving information to the defendant's attorneys in New York so as to enable them to give their professional advice as to the rights of the parties under the policies listed in the Statement of Claim herein and for the assistance of such attorneys and any Canadian solicitors retained by them in any litigation that might follow the disallowance of the plaintiff's claim for disability benefits under such policies and are therefore privileged."

In *Westinghouse v. Midland Railway Company* (1883), 48 L.T. 462, Baggallay L.J. at p. 464, said, in reference to the affidavit there in question, that "It was only in case there should be some future litigation that the documents were to be so submitted", that is, submitted to a solicitor or counsel. The learned Lord Justice, with whom Lindley L.J. agreed, held that privilege from production did not exist in such circumstances. A mere possibility of litigation developing is not sufficient in the case of a communication between a party and a non-professional agent or a third party.

In my opinion the principle of the case just cited applies here and, therefore, it is not necessary to express any opinion as to what my view would have been had the claim for privilege been differently expressed in the affidavit. I should like to reserve for future consideration the question as to whether a medical report obtained, as was the report of Dr. Oille, after a claim for disability benefit under a policy of insurance has been made, is

any the less entitled to privilege than similar reports in the circumstances of such cases as *Cossey et ux v. The London, Brighton, and South Coast Railway Company* (1870), 39 L.J.C.P. 174, and *Skinner v. The Great Northern Railway Company* (1874), 43 L.J. Ex. 150, assuming these latter cases to have been correctly decided.

I would therefore dismiss the appeal.

Appeal allowed in part, KELLOCK J.A., dissenting in part.

Solicitors for the plaintiff, respondent: Erichsen-Brown & Strachan, Toronto.

Solicitors for the defendant, appellant: Blake, Anglin, Osler & Cassels, Toronto.

[COURT OF APPEAL.]

Rex v. Stephen, Allen and Douglas.

Criminal Law—Conspiracy to Commit Indictable Offence—Sufficiency of Evidence — Charge to Jury — Separating Cases against Different Accused—The Criminal Code, R.S.C. 1927, c. 36, s. 573.

S., A., D. and I. were tried upon an indictment containing two counts for conspiracy, arising out of an alleged agreement to impede the operation of the National Selective Service Mobilization Regulations, P.C. 10924/1942. The jury acquitted I., but convicted the other three accused under both counts. On appeal,

Held, the evidence wholly failed to establish that D. was a party to any conspiracy, and his conviction must be quashed. The evidence also failed to establish that A. was a party to any conspiracy of the nature alleged in count 2 of the indictment, and his conviction must be quashed on this count. As to count 1, it appeared that evidence had been improperly admitted, and that the trial judge had failed to draw the jury's attention to matters tending to support A.'s explanation of some of the evidence, or to separate, in addressing the jury, the evidence properly admissible against A. and tending to establish the charge against him. This conviction must therefore also be set aside, but since there was evidence to support a conviction of A. on this count, a new trial should be ordered as to count 1.

Held, further, there was ample evidence to support S.'s conviction on both counts of the indictment, and his appeal should therefore be dismissed. (KELLOCK J.A., dissenting in part, was of opinion that S.'s conviction could be upheld only as to count 1, and that the conviction on count 2 must be quashed).

AN appeal by three accused from their conviction before Hope J. and a jury. The nature of the charge is set out in the reasons for judgment of Kellock J.A.

11th, 12th and 13th April 1944. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and KELLOCK JJ.A.

A. W. Roebuck, K.C., for the accused Stephen, appellant: The evidence of the witness Karam is typical of a number of cases. Stephen received money "to arrange a deferment", and told Karam he would do so, but there is no evidence that he did anything to carry out his promise. No deferment was in fact arranged, and Karam was later arrested as a defaulter. This does not establish a conspiracy, but only a fraud by Stephen. There was no meeting of minds, and there is nothing to show that Stephen had any intention of doing what he promised. [ROBERTSON C.J.O.: Your contention is that Stephen was proved to be a thief, but not a conspirator?] Precisely. [HENDERSON J.A.: Surely the conspiracy is complete when Stephen tells Karam he will do certain things.] No, Stephen must actually intend to do so; there must be a common purpose: Kenny, Outlines of Criminal Law, 15th ed., p. 336, *note*. [HENDERSON J.A.: Stephen did not give evidence at the trial. How can we say

that he did not intend to do what he had agreed to do?] The issue was not properly presented to the jury by the trial judge. There must be a genuine common purpose: *Reg. v. Murphy and Douglas* (1837), 8 C. & P. 297 at 310, 173 E.R. 502.

On not one occasion are any two of the accused persons shown to have joined in committing any act. As to count 2, Stephen cannot be convicted of conspiring with, say, Bolter, to advise Bolter to act in a particular way.

G. A. Martin, for the accused Allen, appellant: Whatever Stephen's actions may have been, there was no evidence that Allen conspired, either with the persons named in the indictment or with others. The evidence against us falls into three groups: (1) books, memoranda, etc., found in our possession; (2) observations by the police officers, who saw Allen and Stephen together on some 15 occasions between 5th May and 15th July; and (3) the evidence as to an interview with the enforcement officer of the Mobilization Board, and as to an attempt to bribe the officer, which, in the circumstances, was inadmissible.

The alleged bribe was in connection with one Assaf, and the first connection shown between Allen and Assaf was after Assaf had already been arrested as a delinquent, at which time he was not subject to the Regulations, but was in the hands of justice. Any attempted bribe, therefore, was not an effort to impede the operation of the Regulations, but an entirely distinct offence, and the evidence was not admissible on this charge. [ROBERTSON C.J.O.: Might the charge not be regarded as based upon a continuing series of transactions, in which case this bribe might have been very useful in the next case?] It was not put to the jury in that way.

The trial judge's charge was inadequate, in that Allen's case was not properly put to the jury. At no time was the case against one accused segregated—the evidence was simply gone over generally, taking the witnesses one by one, in the order in which they had been called. The jury should have been told to find first whether Allen had been guilty of a conspiracy, and that only if they so found were they entitled to consider Stephen's acts as evidence against Allen: *Rex v. McCutcheon et al.* (1916), 25 C.C.C. 310, 28 D.L.R. 378; *Forsythe v. The King*, [1943] S.C.R. 98, 79 C.C.C. 129 at 132, [1943] 2 D.L.R. 737.

Evidence which weighed heavily in favour of Allen should have been pointed out to the jury: *Markadonis v. The King*, [1935] S.C.R. 657, 64 C.C.C. 41 at 42, [1935] 3 D.L.R. 424.

The trial judge dealt with much irrelevant evidence in his charge, without pointing out to the jury that it was irrelevant.

The trial judge, after discussing Allen's own evidence on certain points, said: "If you accept that, and you think there has been no concerted action, then undoubtedly you should acquit Allen." This was a totally incorrect direction as to the burden of proof: *Rex v. Cechetto*, 16 M.P.R. 496, 79 C.C.C. 36, [1943] 1 D.L.R. 609; *Rex v. Philbrook*, [1941] O.R. 352, 77 C.C.C. 26, [1942] 1 D.L.R. 627; *Rex v. Stasiuk*, 50 Man. R. 51, 78 C.C.C. 121, [1942] 2 W.W.R. 569, [1942] 3 D.L.R. 605; *Rex v. Prince*, 28 Cr. App. R. 60, 58 T.L.R. 21, [1941] 3 All E.R. 37.

J. M. Gould, for the accused Douglas, appellant: The evidence against my client is entirely circumstantial, and it is not only equally consistent with innocence, but is consistent only with innocence. There is no evidence to connect us in any way with the conspiracy alleged in count 2, and the evidence as to count 1 is plainly insufficient to justify a conviction.

The trial judge, after saying that Douglas might be considered as "only a tool of somebody else in connection with these matters of conspiracy", said: "After all, it is not required in order to prove conspiracy, and that a person is implicated in it, to prove that he participated in everything in connection with it—everything that was done in connection with the conspiracy. If he had knowledge of what was going on, if you can infer that, then you may consider possibly that Douglas occupied a minor role in connection with the endeavours." This amounts to saying that mere knowledge and standing by will make us a party to the conspiracy, and that is not the law: *Rex v. Dutchak*, 43 C.C.C. 74, [1924] 4 D.L.R. 973.

J. J. Robinette, for the Crown, respondent: A conspiracy is complete as soon as two or more persons agree upon either an unlawful object or unlawful means for attaining their object: *Reg. v. Frawley* (1894), 25 O.R. 431, 1 C.C.C. 253; *Reg. v. Connolly and McGreevy* (1894), 25 O.R. 151, 1 C.C.C. 468; *Rex v. McCutcheon et al.* (1916), 25 C.C.C. 310, 28 D.L.R. 378. The Crown may prove the existence of the conspiracy either by

proving the unlawful agreement or by proving overt acts, incidents which enable the jury to infer, from the conduct of the parties, a pre-existing common unlawful purpose: *Paradis v. The King*, [1934] S.C.R. 165 at 168, 61 C.C.C. 184, [1934] 2 D.L.R. 88; *Rex v. Miller*, 55 B.C.R. 121, [1940] 2 W.W.R. 505, 73 C.C.C. 343, [1940] 3 D.L.R. 293; *Rex v. Container Materials Ltd. et al.*, 74 C.C.C. 113, [1940] 4 D.L.R. 293, varied 76 C.C.C. 18, [1941] 3 D.L.R. 145, which was affirmed *sub nom. Container Materials, Limited, et al. v. The King*, [1942] S.C.R. 147, 77 C.C.C. 129, [1942] 1 D.L.R. 529; *Rex v. Baugh* (1917), 38 O.L.R. 559, 28 C.C.C. 146, 33 D.L.R. 191.

As to Stephen, the Crown's theory was that Stephen, possibly with Douglas, was carrying on the business of trafficking in deferments, and the evidence of actual transactions, together with the documents found in his possession, amply bore this out. There was no evidence that Stephen did not intend to carry out his promises. Some of the documents dealt with these specific transactions. [ROBERTSON C.J.O.: How can you justify the inclusion of other documents, not relating to these particular transactions, among those submitted to the jury?] They were admissible as having been found in the accused's possession, and their probative value was for the jury. [ROBERTSON C.J.O.: That is one of the dangers of trials for conspiracy.]

As to Allen, the principal case is that of Assaf, and the evidence shows that Stephen was also interested in this case. When the bribe was offered, the case was still current, and the enforcement officer might well have had some influence in connection with the trial. Any step to interfere with a prosecution for violation of the Regulations is impeding the operation of the Regulations. Further, it would have been useful for Allen to establish a contact which might assist in future cases. Both Allen and Stephen were clearly involved in a conspiracy, of the nature alleged in count 1, as to Assaf. Allen attempted to explain his constant association with Stephen, but he gave two explanations, which the jury might well have considered inconsistent.

There was no misdirection as to the burden of proof. The trial judge is not required to keep repeating the law as to onus and reasonable doubt. The trial judge did definitely separate the position of each of the three accused, in considering the

theory of the defence. He told them three times that the acts of one accused were not evidence against another accused until a conspiracy had been established. *Rex v. McCutcheon*, *supra*, does not establish that the trial judge must segregate the evidence as against each accused. *Forsythe v. The King*, *supra*, depends upon its own facts, and has no bearing in this case.

We were entitled to give evidence of events antedating the formation of the conspiracy: *Reg. v. Connolly and McGreevy*, *supra*, per Boyd, C.; *Rex v. Master Plumbers and Steam Fitters Co-operative Association, Limited*, *et al.* (1907), 14 O.L.R. 295, 12 C.C.C. 371 (*sub nom. Rex v. Central Supply Association, Limited*). I also rely on the *Container Materials* case, *supra*, in the Court of Appeal and the Supreme Court of Canada.

Even if there were some inaccuracies in the charge, there has been no substantial wrong or miscarriage of justice, and the appeals should be dismissed under s. 1014(2) of The Criminal Code, R.S.C. 1927, c. 36.

I cannot support the conviction of Allen on count 2, and as against Douglas the case is weak, and I shall not struggle to uphold the conviction.

A. W. Roebuck, K.C., in reply: Any suggestion that there could be a conspiracy, under count 2, between Stephen and the persons advised, is answered by *Rex v. Nerlich*, *supra*. A man cannot conspire to advise himself. If Stephen agreed with Kirshenbaum that Kirshenbaum should tell one of the others not to report, that is not a conspiracy to impede the operation of the Regulations, and cannot come under count 2 because that count does not allege a conspiracy with Kirshenbaum. Count 2 cannot be thought to be wholly included in count 1.

G. A. Martin, in reply.

At the conclusion of the argument, THE COURT delivered judgment orally in the appeal of Douglas, allowing the appeal and quashing the conviction. As to the other two appellants,

Cir. adv. vult.

5th May 1944. ROBERTSON C.J.O.:—In my opinion there was evidence upon which the jury was justified in convicting Stephen upon both counts.

I am also of the opinion that while Allen was not involved, so far as the evidence discloses, in all the matters in which

Stephen was concerned, there was evidence upon which the jury might convict him upon the first count—counsel for the Crown conceding that there was no case against Allen on the second count. The evidence relevant to the matters in which it might be found that Allen was involved was so intermingled with other evidence that it became almost impossible for a jury to separate what was proper to be considered in the case against Allen from what was irrelevant so far as Allen was concerned. In truth, in a case of the complexity of this case, an almost impossible task is imposed upon the trial judge when he comes to present to the jury all the angles from which the evidence upon the numerous transactions involved must be regarded, and how it is to be separately considered in deciding the case of each individual accused.

We have, in this case, one of the accused acquitted by the jury. Another, Douglas, although convicted by the jury on both counts, was discharged in this Court because, as counsel for the Crown conceded, the evidence does not support his conviction. Allen was convicted by the jury on both counts, but counsel for the Crown has conceded that the evidence does not support his conviction on the second count. It is difficult to avoid the conclusion that the jury was in some confusion as to the result of the evidence they had been listening to in the many days of the trial.

There was not against Allen, as there was against Stephen, the damaging evidence of the actual taking of money under agreement to commit acts clearly within the purposes of the conspiracy charged. Counsel for Stephen was forced, in argument, to take the position that while Stephen took this money from persons who paid it to him on the basis of a conspiracy with Stephen, as charged, Stephen never did in fact do, or intend to do, any of the things charged as the purposes of the conspiracy, that his agreement to do what he was paid to do was a sham, and that, therefore, for the want of an honest intention on Stephen's part to keep his word, there was no conspiracy.

Allen's is a different case, and while I am of opinion that there was evidence that would support his conviction on the first count, if the jury accepted it and made the inferences that it would warrant, it may well be open to doubt whether the jury had really such a comprehension and discriminating under-

standing of the case against Allen, as distinguished from the case against Stephen, that the case of each of them was dealt with on its own merits. My brother Kellock has pointed out a number of matters affecting Allen that may have been given a weight by the jury that they were not entitled to be given.

I would, therefore, in the case of Allen, order a new trial on the first count. In doing so, I would recommend to the consideration of counsel the propriety of having particulars of the charges, in so far as Allen is concerned. It may assist in directing and confining the evidence to matters that are relevant to his case.

HENDERSON J.A.:—I have had the privilege of reading the opinions of my Lord the Chief Justice and of my brother Kellock. I agree with my Lord the Chief Justice that the conviction of Naiffe Stephen should be affirmed on both counts of the indictment, and I agree with my Lord the Chief Justice and with my brother Kellock that the conviction should be quashed as to Allen, and a new trial ordered on the first count.

KELLOCK J.A.:—This is an appeal by Stephen, Douglas and Allen against the conviction and sentence imposed by Hope J. on 24th January 1944, following the verdict of a jury finding the appellants guilty upon both counts of an indictment. Count 1 charges that Naiffe Stephen, Robert A. Allen, Robert A. Irwin and Robert Douglas, in the years 1942 and 1943, "did unlawfully conspire together and with one another and with Norman Bolter, Hyman Kirshenbaum, George Karam, Louis E. Carusetta and with other persons unknown to commit an indictable offence, to wit: to do acts likely to impede the operation of National Selective Service Mobilization Regulations in violation of section 31 of [those Regulations] contrary to the provisions of section 573 of The Criminal Code." Count 2 charges that the same accused persons, in the years 1942 and 1943, "did unlawfully conspire together and with other persons unknown to commit an indictable offence, to wit: to counsel by oral communication other persons to omit to comply with notices given pursuant to National Selective Service Mobilization Regulations in violation of section 33(a) of [the Regulations], contrary to the provisions of section 573 of The Criminal Code."

The appellants were convicted, but the jury acquitted Irwin who was jointly charged on both counts. On the hearing we allowed the appeal of Douglas under both counts, Mr. Robinette being unable to point to any evidence to support the convictions.

With respect to the appellant Stephen, I am of opinion that there was ample evidence to sustain his conviction under count 1. As to the conviction under count 2, it is to be noted that the conspiracy charged is not a conspiracy to which Bolter, Kirshenbaum, Karam or Louis E. Carusetta, (who are expressly named in the first count) are parties. While there is ample evidence to establish a conspiracy, of the character described in count 2, as between Stephen and some of these last-named persons, no conspiracy with these persons is alleged in this count. They were not unknown to the Crown, and therefore they are not to be considered as included in the "persons unknown" mentioned in count 2: *Rex v. Nerlich* (1915), 34 O.L.R. 298, 24 C.C.C. 256 at 262-3, 25 D.L.R. 138. While there is clear evidence that Stephen told Kirshenbaum to advise a cousin of his (of the same name) and two other persons—Cooper and Bernstein—not to report in pursuance of notices each of these persons had received, there cannot be a conspiracy between Stephen and any of these three persons to counsel themselves to omit to comply with notices given: *Rex v. Nerlich, supra*.

Neither was any conspiracy under count 2 made out on the evidence between Stephen and Allen. Mr. Robinette admits that all the evidence with regard to Allen relates only to count 1. It follows, therefore, that there is no evidence of a conspiracy of the nature charged under the second count between Stephen and any other person, and that the conviction under count 2 should be quashed. It also follows from Mr. Robinette's admission that the conviction of Allen under this count must be quashed.

There remains, therefore, for consideration the appeal of Allen with respect to his conviction under the first count. His counsel bases his appeal upon two grounds, first, the admission of evidence which ought not to have been admitted, and, secondly, misdirection and non-direction on the part of the learned trial judge. Mr. Martin also argued that there was no evidence to substantiate any conspiracy as against his client under count 1. I have come to the conclusion, however, that there was evidence

upon which a jury might have convicted, and, that being so, I shall deal only with the first two grounds above mentioned.

No particulars with respect to either count were asked for or given prior to the trial, but Mr. Robinette advised us that the theory of the Crown, as placed before the jury, was that Stephen, and possibly Douglas, were carrying on the business of trafficking improperly in a wholesale manner with persons called up for military service under the provisions of the National Selective Service Mobilization Regulations, P.C. 10924/1942 ([1942] C.W.O.R. 573), and that "one of the questions was to what extent Allen was participating."

With respect to his contention that evidence had been wrongly admitted, Mr. Martin referred to the evidence of one of the Crown witnesses, E. C. Saba. This witness deposed to the receipt of a call-up notice on 12th May 1942, but said that owing to the illness of his wife he sought deferment, and, not knowing what course of action to take to obtain it, he consulted Stephen, as a friend. On 8th May Stephen wrote a letter on his behalf asking for an extension, and he deposed to receiving a letter from National Selective Service requesting him to obtain a doctor's certificate as to his wife's condition. On 19th May 1942, he received another letter from National Selective Service requesting him to return the travel warrant which had been sent to him with the call-up notice. On 30th May following, he received a second notice to report, which he gave to Stephen, and he was told by the latter that it would not be necessary for him to report, and he did not do so. Again, on 11th August 1942, he received a further notice to report, but as his wife was still ill he saw Stephen and asked him if he could procure for him an additional month. No further notice was received by him, and he heard nothing further about the matter until August 1943, when he was prosecuted and fined. The witness says he did not know Allen, or have any dealings with him whatsoever. In Ex. 4, which is a calendar for the year 1942, seized in Allen's house, the name "Saba" appears once. Allen, in his evidence, said that this referred to a "Thomas Saba", on whose hotel Allen, who is an insurance agent, had a policy of insurance.

The National Selective Service Regulations came into force on 1st December 1942, and nothing in connection with Saba appears to have occurred after that date, and in fact nothing

appears to have occurred later than August 1942. However, this evidence was admitted, as was the evidence of the witness Crawford, also called by the Crown, who testified as to certain acquaintance of his with activities of Stephen prior to 1st December 1942, and to the fact that he had seen Allen prior to that date at the service station where he and Stephen were employed, on a number of occasions. The learned judge instructed the jury that the evidence of Crawford and Saba "as evidence of something done pursuant to the conspiracy or the agreement between the accused" was of no value, and should be disregarded "from that aspect". But he went on to say, "You can, however, consider it from the standpoint of being a certain line of action which Stephen at least was following in the earlier part of 1942, in May." In referring to entries of names in Ex. 5, which was a note-book for the year 1942—as was also Ex. 4, also found in Allen's house—the learned judge said, "These are entries made prior to the date of the coming into effect of these Regulations, December 1st, but do they throw any light upon the nature of some of the events subsequent to December 1st, 1942, which are under consideration here in connection with the conspiracy charge." In my opinion the learned judge was right in telling the jury that events prior to 1st December 1942 were of no value as to a conspiracy with respect to the Regulations, which were not in force at that time, but I think he was in error in directing the jury that they might consider any of these matters as relevant evidence at all. In my opinion the jury should have been directed to disregard all this evidence entirely. At that time the offences now charged did not exist.

Counsel for the Crown endeavoured to support the charge on the ground that this evidence was a matter of history and proper for the consideration of the jury, and *Reg. v. Connolly and McGreevy* (1894), 25 O.R. 151, 1 C.C.C. 468, was cited, particularly the judgment of the Chancellor at pp. 170-1, also *Rex v. Master Plumbers and Steam Fitters Co-operative Association, Limited, et al.* (1907), 14 O.L.R. 295, 12 C.C.C. 371 (*sub nom. Rex v. Central Supply Association, Limited*). With respect to the first case, the learned Chancellor was not dealing with the point here under consideration, but with a conspiracy existing prior to the date charged in the indictment which continued thereafter and which was unlawful at all times.

In the *Master Plumbers* case, Moss C.J.O., while of opinion that the appellant, a corporation, was to be judged upon acts proved to have been committed by it after its incorporation, considered that in weighing those acts, the acts of the individuals who brought about the incorporation, prior thereto, might be looked at to aid the Court in forming a judgment as to the motives which led to the incorporation and the purposes to be served thereby. That is not the question here. Garrow J.A., at pp. 312-313, said: ". . . it is well settled that evidence of the nature of the conspiracy alleged may be given before the necessary criminal agreement is proved." He cited *Rex v. Hammond and Webb* (1799), 2 Esp. 719, 170 E.R. 508, and *Reg. v. Brittain and Shackell* (1848), 3 Cox C.C. 76, both cases establishing merely that general evidence of the existence and nature of a conspiracy may be given before evidence connecting the accused with it. In the case at bar there was no conspiracy prior to 1st December 1942, as there could not be. The offence did not exist. In my opinion therefore this evidence was not admissible.

Mr. Martin referred to another matter. Among the documents seized at Allen's house was a copy of a letter, dated 12th May 1943, Exhibit 21(a), from Capt. J. H. Kent, described as writing on behalf of the Deputy Assistant Adjutant General of M.D. No. 2 to the Officer Commanding No. 2 District Depot, Stanley Barracks, Toronto, with reference to a soldier named Pte. J. A. Charley. It is not necessary to set out the letter in full. Capt. Kent advises this officer that Pte. Charley is then in Toronto on leave from No. 11 District Depot, and is being transferred to No. 2 District Depot on compassionate grounds. The letter goes on to indicate that the soldier had been instructed to report to No. 2 District Depot on the 15th May 1943, and that information had been received that the soldier's wife was expected to enter a hospital, and Capt. Kent requested that consideration be given to the extension of the soldier's pass until, at least, 17th May.

Evidence was given by police officers that Allen and Pte. Charley were observed, between 5th May and 19th May, going into M.D. No. 2 headquarters and Stanley Barracks, and that during this period Stephen was seen with them on some occasions. Allen's explanation was that Pte. Charley had asked him

to assist in getting an extension of his leave, and that the latter had seen some officers at headquarters of M.D. No. 2, and had been successful in this. Allen said he had interested himself in the matter at the request of Stephen, who was a cousin of Charley. This evidence was not contradicted in any way. In my opinion it could have no bearing upon either of the offences charged in the indictment, and counsel for the Crown, before us, did not indicate that it had any bearing. The trial judge did not so direct the jury, but discussed this evidence in his charge at considerable length, and the jury were left, presumably, to attach some importance to it.

Mr. Martin also referred to the evidence of Norman Bolter, called as a witness for the Crown. He is named as one of the conspirators in the first count. He deposed to being a defaulter in respect of a notice to report received by him in March 1943, and to paying money to Stephen in return for the latter's promise to arrange matters for him so that his file would be lost. Prior to this he had received earlier calls, and upon being medically examined had been placed in a lower category. He said, however, that he had no dealings with Allen whatsoever in connection with the matter, but that Allen, later on, in June, had endeavoured to obtain a position for him with the Liquor Control Board of Ontario, but that as he had no permit from Selective Service he could not be considered. He said that Allen told him that if he could obtain such a permit Allen would get him a position. At this time Bolter had already paid Stephen \$400 and was to pay him a further \$300 if Stephen could get him rejected for military service. This in turn would no doubt lead to an employment permit from Selective Service, and the jury might, if they saw fit, draw an inference against Allen. Allen, however, deposed to having been told by Bolter, before he interested himself on his behalf, that he had already been rejected, and said that he was to bring his rejection papers with him on the occasion on which they went to interview the Liquor Control Board. Allen said it was perfectly idle to think of getting employment without such papers, and that he knew that.

Mr. Martin argues that Allen's explanation is supported by a memorandum found in Allen's house by the police, reading: "Rejected, Bolter, Norman, 150 Beverley", and that while the learned judge in his charge left it to the jury to draw an infer-

ence against Allen from Bolter's introduction to Allen by Stephen, he did not place before the jury Allen's explanation.

On examining the charge, one finds that the learned judge refers to the memorandum above referred to only in connection with the other papers found in Allen's house, and asks the question as to what significance attaches to them. In reviewing the evidence of Bolter's dealing with Stephen, the learned judge warned the jury that until they could find evidence of concerted action, his evidence was not applicable to Allen, Douglas and Irwin. He then refers to Allen's efforts to obtain employment for Bolter in these words: "So what did Stephen do? Stephen made an appointment for Bolter to see Allen and they met at Bay and Richmond Streets about 2 o'clock one day in May. Bolter met Stephen at the north-west corner of Bay and Richmond and Allen drove up in his car to the south-west corner. They went over and Bolter was introduced to Allen, who arranged to take Bolter to the Liquor Control Board to get him a job. Has that any significance? I am leaving it to you." He does not otherwise deal with the matter.

In *Rex v. West* (1925), 57 O.L.R. 446, 44 C.C.C. 109, Ferguson J.A., delivering the judgment of the majority of the Court said at p. 449: ". . . while the trial Judge is not required in a summing up to review all the evidence in detail, it is necessary that he makes certain . . . that the evidence in support of the defence is also presented to the jury as carefully as the case for the prosecution and in such a way as to make sure that the jury understand and appreciate its meaning and effect. This, we think, is the meaning and effect of the following additional English cases:

"*Rex v. Warner* (1908), 1 Cr. App. R. 227, 228—Walton, J.: 'I think it is a serious flaw in a summing up if it does not put the case for the prisoner to the jury as carefully as the case for the prosecution.' "

I think Mr. Martin's point is well taken and that the issue arising on the evidence above referred to was not sufficiently placed before the jury by merely asking them as to the significance they attached to the evidence as stated by the learned trial judge.

Mr. Martin also argues that while the learned judge directed the jury generally as to the law with respect to conspiracy, and

subsequently reviewed the evidence of the various witnesses, he did not apply the law to the facts in accordance with the principles to be found in such cases as *Spencer v. The Alaska Packers Association* (1904), 35 S.C.R. 362.

On the evidence, Douglas was not a conspirator at all and the jury have acquitted Irwin. In addition, the evidence did not establish any conspiracy against any one under the second count, and no evidence was given to establish any conspiracy under the first count between Stephen and any unknown person. It is further to be borne in mind that all of the persons named but not charged in the first count were Crown witnesses and swore that they had no dealings whatever with Allen. The issue which presented itself therefore under the first count, so far as Allen was concerned, was whether Allen had been proved to be a party to a conspiracy between Stephen and any one or more of the persons named, but not charged, in the first count. It was necessary that this issue should have been placed clearly before the jury, to be decided by them upon a due appreciation of all the evidence bearing upon it and according to the facts which they found that evidence to establish. It was for the jury to say upon that issue whether the conspiracy charged against Allen was proved beyond a reasonable doubt: *Forsythe v. The King*, [1943] S.C.R. 98, 79 C.C.C. 129 at 131, [1943] 2 D.L.R. 737, and it was for the judge "to direct the jury as to the law and to direct their attention how that law is to be applied to the facts before them according as they find them": *Spencer v. Alaska Packers*, *supra*, per Nesbitt J. at p. 371. I cannot find that this issue was thus presented to the jury. It is not sufficient that the whole evidence be left to the jury in bulk for valuation: *Rex v. Kirk*, [1934] O.R. 443, 62 C.C.C. 19, [1934] 3 D.L.R. 641; *Forsythe v. The King*, *supra*, at 132.

I would, therefore, allow Allen's appeal and quash the conviction and direct a new trial on count 1.

I do not think that Stephen's case is affected by the matters to which I have just referred. There was very clear and cogent evidence against Stephen under count 1, and I think that the onus resting upon the Crown under the provisions of subs. 2 of s. 1014 of the Code, as established in such cases as *Brooks v. The King*, [1927] S.C.R. 633, 48 C.C.C. 333, [1928] 1 D.L.R. 268;

and *Makin et ux. v. The Attorney-General for New South Wales*, [1894] A.C. 57 at 70, has been met. I refer also to *Rex v. Haddy* (1944), 60 T.L.R. 253.

Stephen's appeal dismissed, KELLOCK J.A. dissenting in part; Allen's appeal allowed and new trial ordered as to count 1.

Solicitors for the accused Stephen, appellant: Roebuck & Bagwell, Toronto.

Solicitor for the accused Allen, appellant: T. M. Creighton, Toronto.

Solicitor for the accused Douglas, appellant: J. M. Gould, Toronto.

Solicitors for the Crown, respondent: Rowan & Robinette, Toronto.

[HOPE J.]

Head et al. v. Community Estates & Building Company Limited.

Landlord and Tenant—Obligations of Lessor—Express and Implied Covenants—Apartment House—Provision of Heat and Hot Water—Measure of Damages.

The defendant, owner of an apartment building, covenanted with each of its tenants "to provide suitable means for heating and furnish heat for the said premises up to a reasonable temperature". The building was heated with oil, and in spite of repeated warnings from the Oil Controller as to the shortage of fuel oil, and the desirability of converting to coal heating, the defendant took no steps until, some seventeen months after the first warning, the supply of fuel oil was cut off, and the buildings remained entirely unheated, and without hot water, for some days, during which time the temperature in the apartments fell as low as 27 degrees above zero.

Held, the defendant was clearly guilty of a breach of the covenant. It had failed to supply either "suitable means" or sufficient heat, and was accordingly liable for all the out-of-pocket expenses incurred by the tenants in consequence. *Inverarity v. Muller* (1926), 31 O.W.N. 339, referred to. Because of an express limitation in the lease, the defendant was not liable for general damages.

Held, further, there should be implied, in the circumstances shown by the evidence, a covenant by the lessor to provide sufficient hot water for the use of the lessees, and there had also been a breach of this implied covenant, entitling the plaintiffs to damages. *Brymer v. Thompson* (1915), 34 O.L.R. 194, 543; *Johnston v. Givens*, [1941] O.R. 281, applied.

AN action for damages. The facts are fully stated in the reasons for judgment.

1st May 1944. The action was tried by HOPE J. without a jury at Toronto.

Alexander Stark, for the plaintiffs.

R. M. Willes Chitty, K.C., for the defendant.

10th May 1944. HOPE J.:—This is an action for damages brought by eighteen tenants of an apartment house in Toronto owned by the defendant company.

The following statement of facts agreed to by counsel for both parties was filed as Ex. 1:

“IT IS AGREED:—

“1. That the plaintiffs at all material times were tenants of the Defendant, occupying apartments in the Avenue Homes Apartments, 869-875 Avenue Road, in the City of Toronto.

“2. That the services provided by the landlord included the supply of heat and hot and cold water.

“3. That the same written lease was in effect between the landlord and each tenant, the form used being the form provided by Grand & Toy Limited, Toronto, and described as Form 231.

“4. That the apartments were without heat from March 3 to March 11 inclusive, 1943, and were without hot water from March 3 to March 29 inclusive, 1943.

“5. That during the period March 3 to March 29 inclusive, 1943, by reason of the lack of heat and the lack of hot water, the tenants incurred respectively the disbursements set out in the Statement of Claim.”

The defendant's counsel's agreement was qualified to the extent that he did not concur with the precise dates mentioned in paras. 4 and 5 above, claiming that the period in question was of slightly shorter duration. On the evidence, I am, however, of opinion that the dates mentioned in the two paragraphs referred to must be accepted. It may be quite true that the heating equipment in the apartment building resumed operation on the evening of 9th March, at which time delivery of fuel oil to the defendant was temporarily resumed; nevertheless it is quite evident that it took approximately thirty-six to forty-eight hours for the temperature of the building to be raised to a suitable and reasonable one.

The pertinent clause in the lease referred to in para. 3, *supra*, reads as follows:

“The Lessor covenants with the Lessee that the Lessor will during the terms between the 15th day of October and the 15th day of May provide suitable means for heating and furnish heat for the said premises up to a reasonable temperature for the

reasonable use thereof by the Lessee, except during the making of repairs; but should the Lessor make default in so doing, he shall not be liable for indirect or consequential damages or damages for personal discomfort or illness."

The difficulties which brought about this action arose out of the Oil Controller's restrictions on the use of fuel oil in certain commercial institutions and other buildings.

The defendant received a letter from the Oil Controller dated 8th October 1941 (Ex. 5), drawing attention to the uncertainty of the supplies of fuel oil and stating: "The category of heating, which includes your installation, would be one of the first to be curtailed. Therefore, since this may result in a possible shutdown of your heating plant, we urge that you seriously study the changing of your plant from oil to coal without delay."

Again, on or about 23rd June 1942, the defendant received from the Oil Controller a letter (Ex. 6), stating, *inter alia*: "After Aug. 31st of this year fuel oil must not be used for industrial or commercial heating or steam production.

"In your own interest we urge that you take full advantage of this interval to provide the necessary equipment so that you may operate your plant on coal or other substitute fuels."

Following these notices, Dr. Carthy, the manager of the defendant company, carried on certain investigations in connection with his heating plant and its conversion, and I gather he also tried to obtain from the Oil Controller permission to remain as a consumer of fuel oil. Temporary permits were granted by the Oil Controller from time to time to the defendant, but always with insistence that the heating plant must be converted.

Judging by the manner of Dr. Carthy when giving testimony at the trial, I would not be surprised if his persistence in the continuance in the use of fuel oil was influenced to a large extent by his own stubbornness, and if to a great extent the failure to convert was due to disinclination to do so. At all events, when finally compelled by the drastic action of the Oil Controller in refusing any oil supply to him in March 1943, the conversion was quickly arranged.

On 14th January 1943, the Oil Controller again advised the defendant by letter, a copy of which was sent to each tenant, that the defendant had been advised by the Oil Controller from

the fall of 1941 to convert the heating plant from oil to coal, and that the defendant had given no concrete indication of the defendant's intention to convert, and that therefore no further permits for fuel oil would be issued to the defendant after 19th January 1943. Thereupon the tenants, some twenty-nine in number, delivered a letter (Ex. 3), dated 20th January 1943, to the defendant stating, *inter alia*: "We, of course, would not object to a temporary and reasonable lack of heat while your heating plant was converted to coal, but would most strenuously object to a lack of heat due to your having no oil available."

On 3rd March the oil supply was finally exhausted and no temporary permit was issued by the Oil Controller.

It is to be noted that the defendant's covenant above quoted is, firstly, to "provide suitable means for heating"; and secondly, to "furnish heat . . . up to a reasonable temperature for the reasonable use . . . by the Lessee."

In view of the repeated warnings and failure to take effective action, I am of the opinion that the defendant is guilty of a breach of the covenant to provide "suitable means for heating" in the defendant's failure to effect the conversion of his heating plant from oil to coal.

On the evidence it is abundantly clear that the defendant has also been guilty of a breach of the covenant to furnish heat up to a reasonable temperature. The evidence was that the temperature in some of the apartments during the period in question was as low as 27 and 28 degrees above zero.

The covenant contained in the lease excepts the application of the defendant's covenant during the making of repairs. It cannot, in my opinion, be reasonably argued that the conversion of the plant was in the nature of the making of repairs.

The plaintiffs found their claim firstly on the covenant to supply heat as cited, and secondly on an implied covenant to supply hot water.

That a breach of such covenant entitles the lessee to damages was determined in *Johnston v. Givens*, [1941] O.R. 281, [1941] 4 D.L.R. 634. That there was the alleged breach is amply established by the evidence.

The question of implied covenants was discussed and decided by Middleton J. in *Brymer v. Thompson* (1915), 34 O.L.R. 194, 23 D.L.R. 840, affirmed 34 O.L.R. 543, 25 D.L.R. 831. In my

opinion there was clearly an implied covenant in the circumstances here present by the defendant to provide the lessees with water supply, both cold and hot, for the reasonable use of the lessees.

In its pleadings the defendant suggests that the doctrine of impossibility of performance, owing to circumstances beyond its control, protected it from the claims of the plaintiffs—although at the trial, as I understood counsel's argument, this defence resolved itself into one of frustration.

Neither of these grounds is tenable in the light of the evidence. Measures ultimately taken by the defendant to meet the situation could have been effected much earlier by the defendant—even in summer weather—and so caused little or no trouble or inconvenience to the tenants.

I must find for the plaintiffs.

In *Inverarity v. Muller* (1926), 31 O.W.N. 339, it was stated that damages for the breach of a covenant to supply heat should not be pared down when the breach is due to the landlord's meanness.

The same should prevail where, as in this case, the landlord has ample warning which should have enabled him to take steps to provide "suitable means for heating" in due season—and where the landlord with rare persistence continued to rely on his oil-burning equipment, so long, in fact, that, as the Deputy Oil Controller testified, the defendant was the last oil consumer of its class to effect conversion for use of other fuel.

Bearing in mind the restriction on the liability of the defendant by reason of the exception in the covenant in the lease, viz., "not be liable for indirect or consequential damages or damages for personal discomfort or illness", I find on the evidence that the damages claimed by the various plaintiffs respectively, as set out in particulars filed as part of Ex. 1 herein, have been substantiated save as to Jas. W. Kerr, whose damages for room and board should only be computed to 12th March instead of 17th March as set out. I do not think that the defendant can complain seriously that some tenants chose accommodation in first-class hotels in comparable substitution for the apartments leased from the defendant.

The various claims for meals, for extra electricity consumed, for laundry and other out-of-pocket expenses, are fully justified.

However, the exemption from liability in the covenant precludes the plaintiffs' claims for the general damages set out in the prayer.

There shall therefore be judgment for each of the plaintiffs for the respective claim of each for out-of-pocket expenses.

I am satisfied that the joinder of the plaintiffs in one action herein falls well within the required conjunctive proviso as set out in *Mason v. Grand Trunk Railway Company* (1904), 8 O.L.R. 28, and *Laister v. Crawford* (1911), 2 O.W.N. 547, 18 O.W.R. 308.

The plaintiffs are therefore entitled to one set of costs against the defendant on the County Court scale, but without set-off.

Judgment accordingly.

Solicitor for the plaintiffs: Alexander Stark, Toronto.

Solicitors for the defendant: Chitty, McMurtry, Ganong & Wright, Toronto.

[KELLY J.]

The King v. The Globe Indemnity Company of Canada.

Succession Duties—What Assets Dutiable—Shares in Ontario Company—Situs—Certificates Situate outside Ontario—Transfer Offices both in Ontario and Elsewhere—The Succession Duty Act, R.S.O. 1937, c. 26, s. 9(a).

The principle of *The King v. Williams et al.*, [1942] A.C. 541, is not affected either by the fact that share certificates are not endorsed in blank by the testator or by the fact that the company maintains no transfer office in the State in which the testator was domiciled. The Court, in an action in which succession duties are alleged to be payable in Ontario on shares of a company, the certificates having been found outside the Province, need only determine whether or not the shares had their situs in Ontario; it need not go further and ascertain where the situs in fact was.

A testator, domiciled in Michigan, owned shares of an Ontario company which, in addition to its head office and transfer agency in Ontario, maintained a registrar and transfer agent in the State of New York. The share certificates were found with the testator's personal belongings, in Michigan.

Held, no duties were payable on these shares in Ontario under The Succession Duty Act, R.S.O. 1937, c. 26, since, whatever their true situs might be, they were not property situate in Ontario, within the meaning of s. 9(a) of that Act.

AN action upon a bond. The facts are fully stated in the reasons for judgment.

20th March 1944. The action was tried by KELLY J. without a jury at Toronto.

*C. R. Magone, K.C., and J. D. O'Brien, K.C., for the plaintiff.
Everett Bristol, K.C., for the defendant.*

12th May 1944. KELLY J.:—This is an action to recover under a bond given by the defendant company to the Treasurer of Ontario, binding itself to pay all duties which might be payable under the provisions of the Succession Duty Act of Ontario on 500 shares of Lake Shore Mines Limited owned by one Thomas Kerr, late of the city of Detroit, in the State of Michigan, one of the United States of America. The said Thomas Kerr died on or about the 8th day of January 1939, and at the time of his death he was a citizen of the United States of America, domiciled in the city of Detroit in the said State of Michigan. Letters probate of the last will and testament of the late Thomas Kerr were granted to Robert M. Kerr, of the said city of Detroit, on 28th February 1939. No ancillary letters probate of the said last will and testament of Thomas Kerr were applied for or granted out of any court in the Province of Ontario.

The parties agreed upon a statement of facts which was filed as part of the record. It appears that Lake Shore Mines Limited is a company incorporated by letters patent issued under the Ontario Companies Act. It was further admitted that the said Lake Shore Mines Limited maintains its head office in the Province of Ontario and also has appointed the Trusts and Guarantee Company of Toronto as its transfer agent and the Royal Trust Company of Toronto as registrar of its capital stock. In addition, on 18th May 1927, the Board of Directors of the said company passed a resolution appointing the Manufacturers & Traders Trust Company of the city of Buffalo, in the State of New York, as its transfer agent and registrar of its stock. It was also admitted that at the date of the death of Thomas Kerr, Lake Shore Mines Limited maintained a registrar and transfer agency both in the city of Buffalo and in the city of Toronto, and that the name Thomas Kerr appeared as owner of 500 shares of Lake Shore Mines Limited in the books of the Manufacturers & Traders Trust Company as registrar at Buffalo and in the books of the Trusts and Guarantee Company as the company's registrar in Toronto. It was further admitted that the shares of the late Thomas Kerr could have been fully and effectively transferred either in the city of Buffalo or in the city of Toronto.

It further appears from the admitted facts that Robert M. Kerr, the executor of the late Thomas Kerr, applied to the Manufacturers & Traders Trust Company at its offices in Buffalo for transfer of the said shares into his own name as executor of the estate of Thomas Kerr, but the transfer agent required the consent of the Treasurer of Ontario under The Succession Duty Act before making the transfer. The said executor then applied for such consent to the Succession Duty office of Ontario and such consent was at first refused, but was later given to the executor upon the executor furnishing the bond of the defendant company which is being sued on in this action. The said 500 shares of stock were then transferred to the name of the executor at the office of the Manufacturers & Traders Trust Company in Buffalo.

The facts in this case are quite similar to the facts adjudicated upon by the Judicial Committee of the Privy Council in the case of *The King v. Williams et al.*, [1942] A.C. 541, [1942] 2 All E.R. 95, [1942] 3 D.L.R. 1, [1942] 2 W.W.R. 321, which latter case, for convenience, I shall hereinafter refer to as the *Williams* case.

There are two main differences between the facts of the case at bar and those in the *Williams* case: (a) in the case at bar the certificates for the shares were not endorsed and signed in blank by the testator; (b) at the date of death of the testator Lake Shore Mines Limited had not authorized or appointed a registrar and transfer agent in the State of Michigan.

Dealing with the first difference above mentioned, in the *Williams* case the stock certificates were endorsed in blank, but the certificates were in the name of the deceased and the shares were registered in the books of the company in the deceased's name. In the case at bar the shares are registered in the name of the deceased and the certificates were not endorsed in blank. In both cases the certificates were located with the belongings of the deceased and at the place where the deceased was domiciled at the time of his death. Endorsing certificates for shares of stock in blank makes the certificates what is known as "street certificates" and has the effect that, by delivering the certificates so endorsed, the transferee, to whom the certificates are delivered, has the right then to surrender the certificates to the company at its transfer office and demand certificates in his

own name. Until the certificates are so surrendered the property cannot be said to pass, because dividends would still be paid to the person registered as the owner of such shares in the books, and the only person entitled to vote by reason of such shares would be the person so noted as owner in the company's books. Endorsing such stock certificates and retaining possession of them would in no way affect the status of the shares or the ownership of the shares represented by the stock certificates. I am of the opinion, therefore, that so far as the provisions of the Succession Duty Act of Ontario are concerned, the fact that the stock certificates were endorsed or not would in no way affect the application of the principles enunciated in the *Williams* case to the case at bar.

Dealing with the second difference between the facts in the *Williams* case and those in the case at bar, in the *Williams* case the certificates were physically located in the State of New York, where the deceased owner was domiciled, and in which State the company maintained a transfer agent and registrar for its stock. In the case at bar the certificates of stock were located in the State of Michigan, where the deceased owner was domiciled at the time of his death, but in which State the company did not maintain a transfer agent or registrar. In both cases the property was shares of stock in Lake Shore Mines Limited.

One Harry E. Harding, an attorney-at-law of the city of Buffalo, was called as a witness, and his evidence was to the effect that according to the Constitution of the United States there is no situs at large for intangible property within the United States; that domicile is confined to the State and there is no general domicile for the United States; and further that according to the law of New York the situs of shares owned by a person not resident in New York State could not be in the State of New York.

It was urged in argument before me that the shares in question could not have a situs in the State of Michigan because of the absence of a transfer agent and registrar located there, and because accordingly the shares could not be effectively dealt with and transferred in the State of Michigan. Further, as between the State of New York and the Province of Ontario, it was urged that the situs must be in Ontario because the com-

pany has its main assets in Ontario; its head office is in Ontario; its meetings are held in Ontario; dividends on its stock are declared and delivered from its offices in Ontario; and the shares could be effectively dealt with in the Province of Ontario. Further, it was argued that according to the evidence submitted at the trial the situs of the shares could not be in the State of New York.

It was also contended that in dealing with the issues raised in this action I must fix the situs for the shares in question. I cannot agree with this contention, and do not think it is necessary for me to fix the situs for the said shares. I am of the opinion that it is only necessary for me to decide whether the shares in question are property situate in Ontario under s. 9(a) of The Succession Duty Act, R.S.O. 1937, c. 26. It nowhere appears that the company, in appointing the Manufacturers & Traders Trust Company of Buffalo as its registrar and transfer agent, did so for the convenience and benefit only of the holders of its stock living in the State of New York. On the contrary, it would appear from the text of the resolution passed by the directors that the appointment was for the convenience of all holders of the company's stock living in the United States. It is freely admitted by the plaintiffs that the shares in question could be effectively transferred and dealt with outside of Ontario, and that it required no act in the transmission of the said shares to be done in the Province of Ontario.

Applying the test as laid down by the said case of *The King v. Williams et al.* above referred to, and in the cases therein considered, I have come to the conclusion that the situs of the said shares, in so far as applying the provisions of the Succession Duty Act of Ontario, is not necessarily in the Province of Ontario. Accordingly the action will be dismissed with costs.

Action dismissed with costs.

Solicitor for the plaintiff: C. R. Magone, Toronto.

Solicitors for the defendant: White, Ruel & Bristol, Toronto.

[HOGG J.]

Cohen v. S. McCord & Co. Limited.

Negligence—Contribution between Joint Tortfeasors—How Contribution Obtained—The Negligence Act, R.S.O. 1937, c. 115, s. 2(1).

Estoppel—Res Judicata—Extent of Rule—Matters which might have been, but were not, Litigated in Previous Action.

Where a plaintiff, having sued two defendants, C and M, for damages arising from injuries alleged to have been caused by the negligence of the defendants in the operation of their respective motor vehicles, abandons his claim against M, and consents to the dismissal of the action against him, and C's counsel is then asked whether he proposes to make any claim over against M for contribution and indemnity, and replies that he does not propose to make any such claim in that action, C will not be permitted, after judgment has been given against him, to bring a new action against M, alleging negligence and claiming contribution and indemnity. S. 2(1) of The Negligence Act, R.S.O. 1937, c. 115 (on which alone any claim to contribution between joint tortfeasors can be based) contemplates that the respective degrees of fault or negligence of two or more defendants, and their rights, as among each other, to contribution or indemnity, shall be determined in the action brought by the person injured by that negligence, and does not contemplate a separate action for that purpose. Further, C will be estopped, on the principle of *res judicata*, from alleging negligence on M's part, and claiming contribution or indemnity, since the issue is one which could have been determined in the original action, and was withdrawn from the consideration of the Court in that action by C's own act.

A MOTION for judgment upon a question of law on a special case stated by the parties under Rule 126. The facts are fully stated in the reasons for judgment.

5th April 1944. The motion was heard by HOGG J. in Weekly Court at Toronto.

E. L. Haines, for the defendant, applicant.

R. F. Wilson, for the plaintiff, *contra*.

12th May 1944. HOGG J.:—On the 6th August 1942, one John Krawchuk, an infant, by his next friend Dmytro Krawchuk, and the said Dmytro Krawchuk, commenced action against Alfred Cohen and S. McCord & Co. Limited, who are the parties to the present motion, for damages arising out of injuries suffered by the infant plaintiff, alleged to have been caused by the negligence of the defendants in the operation of their respective motor vehicles upon one of the streets of the city of Toronto. In their statements of defence neither defendant alleged negligence on the part of the other, but both defendants pleaded the provisions of The Negligence Act, R.S.O. 1937, c. 115.

During the course of the trial of that action the plaintiff authorized the dismissal of the action against the defendant

the McCord company with costs, and in so far as the plaintiff was concerned the action against this defendant was at an end. As was said by Riddell J.A. in *Lecomte v. Bell Telephone Co. of Canada*, 66 O.L.R. 580, [1931] 2 D.L.R. 241, there is no authority "which would justify the Court in compelling any plaintiff to claim anything but what he chooses to claim." At this point the trial was adjourned in order that counsel for both parties might discuss the situation, caused by the dismissal of the action against one of the defendants, with the trial judge. Counsel for the McCord company asked counsel for the defendant Cohen whether the latter intended to have any claim he might consider he had, for indemnity from his co-defendant the McCord Company with respect to damages which might be awarded to the plaintiffs against Cohen, proceeded with in the action, and evidence of alleged negligence on the part of the McCord company presented to the jury. Counsel for the defendant Cohen replied, after due consideration, that he did not intend to make any claim, on behalf of the defendant Cohen, for contribution against the McCord company, in the action then in process of trial. He said "so far as this action is concerned I am not making any claim over against the co-defendant McCord." Counsel for the other defendant then stated that he would retire from the trial, and was allowed to do so by the trial judge, and the McCord company took no further part in the trial.

The jury found Cohen guilty of the negligence which caused the injuries to the infant plaintiff and awarded the sum of \$2,400 against this defendant, for which judgment was signed, with costs, on the 11th May 1943. The disposition of the amount of damages between the plaintiffs was altered as the result of an appeal of the defendant Cohen to the Court of Appeal, but this fact is not material to the issue presented by this motion.

Cohen, the defendant in the action aforesaid, has now brought action against his former co-defendant, the McCord company, by writ issued 28th June 1943, setting out in his statement of claim the alleged acts of negligence on the part of the driver of the motor vehicle of the McCord company which Cohen says were the sole cause of the injuries to the infant Krawchuk, and pleading that in the first action the defendant Cohen had reserved his rights under The Negligence Act as against the McCord company. Cohen pleads The Negligence

Act as the basis of his claim for indemnity or contribution against the McCord company, and claims the sum of \$4,173.43.

Both parties to the second action have invoked the provisions of Rule 126, under which questions of law arising in any cause may be stated for the opinion of the Court. Counsel for the parties have agreed upon a statement of facts, and upon a question of law which is now submitted for determination. This question is as follows: "Is the Plaintiff now entitled to bring this action for contribution or indemnity having failed to make a claim for contribution or indemnity against S. McCord & Company Limited in the original action of Krawchuk v. Cohen and McCord?" I think that the question should have been wider in its scope. It is not only a question of whether Cohen can now claim contribution from the McCord company, but also whether he can now seek to have the McCord company found to be negligent. Negligence is a condition precedent to contribution and indemnity. The parties have further agreed that if the answer to the question above propounded is in the negative, then judgment is to be given dismissing the action with costs, but if the answer is in the affirmative, this application is to be dismissed with costs.

The pleadings of neither defendant contained a specific claim of negligence against the other, or for contribution, and as was said in *Timmins v. Taggart Service Ltd.*, [1940] O.W.N. 140, [1940] 4 D.L.R. 285, by Roach J., a defendant would have a right to contribution depending on negligence being shown and provided that contribution is claimed. The ordinary rule is that such facts should be alleged as will bring a party within the provisions of a statute. In the discussion above referred to, between counsel for the defendants in the original action, there was no question raised and no objection taken by either that negligence as between the defendants had not been alleged in their statements of defence, and that no claim for contribution had been pleaded. It seems to be apparent that it was considered by counsel that the trial judge could have presented to the jury the question of negligence on the part of all parties, and that the matter of contribution could have been decided in the action then before the Court, if counsel for the defendant Cohen had been willing to have it then determined. It was argued that since The Negligence Act, which was pleaded, gives the sole

right to contribution among defendants, if the evidence shows negligence the Court shall determine the degree of such negligence, not only as between the parties, but even, in certain cases, as between parties to the action and persons who are not parties. The whole circumstances, and the discussion between counsel, are, I think, sufficient to warrant the conclusion that the parties would have agreed to any amendment to the pleadings being made which might have been considered necessary if the plaintiffs had not abandoned their claim against the McCord company.

Counsel for both parties have stated, and after a careful search I agree, that the exact point in issue has not, up to the present time, been presented for determination. I would like to say that I have received much assistance from the able presentation of the case to me by counsel for both parties. Prior to a few years ago the defendants to an action in tort who were negligent wrongdoers had no right of contribution one from another: *Sutton v. Town of Dundas et al.* (1908), 17 O.L.R. 556, per Moss C.J.O. In *Esten v. Rosen*, 63 O.L.R. 210, [1929] 1 D.L.R. 275, in the Court of Appeal, it was held that there was no right to contribution among tortfeasors, and at p. 214 Middleton J.A. stated that the rule in its widest sense as applicable to all tortfeasors has become part of the settled law of England and of this Province and that "it must prevail unless the Legislature sees fit to interfere or some modification of this now well established doctrine is made by the House of Lords or the Privy Council." Not long after the judgment in *Esten v. Rosen*, *supra*, the Ontario Legislature, in 1930, apparently as a result of the remarks above quoted of Middleton J.A., passed The Negligence Act, c. 27 of the statutes of 1930. The Act was amended by 1931, c. 26 and 1935, c. 46, and is now R.S.O. 1937, c. 115. The amendment made by 1939, c. 47, s. 23, does not affect the present case. See also the dissenting judgment of Riddell J.A. in *Sauriol v. Summers; Shell Oil Co. of Canada, third party*, [1939] O.R. 253, [1939] 2 D.L.R. 297. For the first time in this Province, where two or more defendants are found to be at fault or negligent, because of which a person has suffered injury, each is liable to make contribution and indemnify the other in the degree in which each is found to be negligent in an action brought for damages for an injury caused by the negligence of such defendants. The right, therefore, of the plaintiff Cohen to

claim contribution and indemnity against the McCord company is founded entirely on the statute, and such being the case this right is confined solely within the ambit of the statute. The present section of The Negligence Act, R.S.O. 1937, c. 115, which provides for contribution among tortfeasors is s. 2(1), which reads:

"(1) Where damages have been caused or contributed to by the fault or neglect of two or more persons the court shall determine the degree in which each of such persons is at fault or negligent, and, except as provided by subsections 2 and 3, where two or more persons are found at fault or negligent, they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent." This subsection as it now stands was first enacted by 1931, c. 26, s. 2.

There arise two questions for consideration: First, does the language of the above subsection limit the determination of the matter of the degree of negligence and of contribution between defendants to the action of a plaintiff for damages for injuries caused to him by the several defendants? And second, if the language of the subsection does not compel the matter of negligence and contribution and indemnity to be tried in the action of the plaintiff for damages, does the fact that these matters were an issue which could have been determined in the action, but were withdrawn, and their determination therefore prevented, by one of the defendants to the action, estop such defendant, by application of the doctrine of *res judicata*, from bringing a subsequent action against his co-defendant to determine whether negligence on the part of such co-defendant caused or contributed to the injuries suffered by the plaintiff in the original action, and for contribution?

I wish first to discuss s. 2(1) of The Negligence Act in its bearing on the question under consideration. The subsection provides that the degree in which defendants are at fault or negligent shall be determined by the Court and that when the degree of fault is found the question of contribution arises. Riddell J.A. (in a dissenting judgment) in *Sauriol v. Summers*,

supra, said, referring to the said s. 2(1) of The Negligence Act, and to the degree of negligence of co-defendants: "They [the defendants] are so 'found' by the Court; and until they are so 'found', there is no obligation on them toward their co tortfeasor; they owe no duty to him unless and until the Court has determined the relative degree of their wrongdoing." See also, *Johnson v. Cartledge and Matthews* (*Matthews, third party*), [1939] 3 All E.R. 654.

Upon the argument counsel discussed the judgments, among others, in the following cases in which the question of contribution under The Negligence Act is considered, in an endeavour to throw light on the question presented for determination.

In *Mara v. Hartley*, [1931] O.R. 69, [1931] 2 D.L.R. 734, in the Court of Appeal, the question of contribution between those found to be at fault was considered as it was affected by The Negligence Act of 1930, c. 27, s. 3, which read in part: "In any action founded upon the fault or negligence of two or more persons the court shall determine the degree in which each of such persons is at fault or negligent," etc. Middleton J.A., at p. 73, in commenting on the direction made that the dismissal of the action was to be without prejudice to any application the defendant might make for leave to proceed by third party procedure against another, said:

"I suggest this to avoid any contention arising as to the right to indemnity and relief over being confined to the power of the Court in the action brought, as sec. 3 of the statute commences with words which may possibly limit the generality of the later provisions of the clause 'in any action brought.' "

Middleton J.A. was also of the opinion that the right to contribution between wrong-doers under The Negligence Act did not depend upon the election of the plaintiff as to whom he would sue.

About the same time the same section of the statute was considered in *Cameron v. Murray*, [1931] O.R. 83, [1931] 2 D.L.R. 654, by Sedgewick J. in an action which arose by reason of a collision of motor vehicles upon a highway. The dispute was whether the defendant could compel the addition of a defendant against whom the plaintiff had no claim. The learned judge was of the opinion, as expressed by him at p. 85, that: "The Act does not seem to provide generally for contribution

between joint tortfeasors, but only between tortfeasors who are parties to an action. It seems to me that the Act contemplates the giving of relief only between parties to an action."

The opinions of Middleton J.A. and Sedgewick J. are expressed in respect of the right of contribution of the defendant to an action against a person who is not a party to the action, and they are both based on the former section of the statute.

In *Sauriol v. Summers, supra*, the right of contribution among joint tortfeasors was again considered. But here again the issue was the right of a defendant against someone not a party to the original action, and it was not a question of a separate action being brought, but a matter of bringing in another wrong-doer in addition to the defendant in the action already commenced by the injured person. The statute was amended in 1939 with reference to rights against third parties.

Randall v. Prest; Hamilton Street Railway Company (Third Party), [1943] O.R. 749, [1943] 4 D.L.R. 751, in the Court of Appeal, is a recent case in which the matter of contribution under The Negligence Act was involved, but this also was a case of a claim for contribution against a third party, and it was held that the third party should be brought into the action.

I cannot think that the Legislature intended that where the fault or negligence of two or more defendants in an action in tort is before the Court, and the question of such negligence and the right to contribution and indemnity between such defendants can be decided in the action brought by an injured person for damages, the issue of the degree of fault of one of the defendants, and the right to contribution, should be made the subject of another action between defendants to the original action.

Turning from the discussion of The Negligence Act, the common law doctrine of estoppel by matter of record, known as *res judicata*, is not abrogated or set aside by that statute, and the application of this principle to the facts presented on this motion must be considered. *Res judicata* has been the subject of discussion and definition by many judges in times long past and in our own day. Middleton J. in *Ross v. Scottish Union and National Insurance Co.* (1919), 46 O.L.R. 291 at 295, 50 D.L.R. 356, stated the rule to be:

"The conclusive effect of a judgment is to determine not merely the issues raised between the parties in the action, but

also all other issues which ought to have been raised, at any rate so far as the particular claim therein set up is concerned."

This decision was reversed on appeal, 47 O.L.R. 308, 53 D.L.R. 415, but the principle as expressed by Middleton J. is not affected.

And in a more recent case, that of *Upper v. Upper*, [1933] O.R. 1, [1933] 1 D.L.R. 244, the same learned judge, at p. 7, quoted Wigram V.C. in *Henderson v. Henderson* (1843), 3 Hare 100, where he said:

"Where a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

Other cases in our own courts, in which the doctrine of *res judicata* was the subject of discussion, are: *Davidson v. The Belleville and North Hastings Railway Company* (1880), 5 O.A.R. 315; *Foster v. Reaume*, 60 O.L.R. 63, [1927] 1 D.L.R. 1024, in which Masten J.A. reviewed at length the judgment of the House of Lords in the leading case of *Hoystead et al. v. Commissioner of Taxation*, [1926] A.C. 155; *Re Knowles*, [1938] O.R. 369, [1938] 3 D.L.R. 178; *Thomson v. Lambert*, [1938] S.C.R. 253, [1938] 2 D.L.R. 545, 70 C.C.C. 78; and *Re Orford*, [1943] O.W.N. 714.

In *Thomson v. Lambert*, *supra*, Davis J., who delivered the judgment of the majority of the Court, said, at p. 272:

"I would allow the appeal of Thomson upon the ground that there was a complete remedy for the respondents in the court in which the first action was started. Collins, M.R. (with whom Stirling L.J. concurred) in *Williams v. Hunt*, [1905] 1 K.B. 512, said:

"'Where proceedings have been started, it is an abuse of the process of the court to divide the remedy where there is a complete remedy in the court in which the suit was first started.' " And at p. 273, Davis J. again said:

"The respondents should not be permitted to go on suing one person after another *ad infinitum* where a complete remedy was available in one action."

The question of the right of the defendant Cohen in the action of Krawchuk and the McCord company to establish negligence and for contribution and indemnity, against his co-defendant, the McCord company, was a matter which could have been decided in that action, and it was not so decided because the defendant Cohen chose or elected not to have it determined in the action then before the Court; "the Court requires the parties to that litigation to bring forward their whole case."

In my view, the principle of *res judicata* applies, and Cohen cannot, because of the estoppel set up by this doctrine, now seek to have the question of negligence against, and of contribution from, the McCord company decided in the action which he has now brought.

I have concluded that the question submitted to me must be answered in the negative, and, such being the case, in pursuance of the consent of the parties filed, the action is dismissed with costs.

Action dismissed with costs.

Solicitors for the plaintiff: Day, Ferguson, Wilson & Kelley, Toronto.

Solicitors for the defendant: Haines & Haines, Toronto.

[COURT OF APPEAL.]

Stockinger v. The Town of Cobourg.

Municipal Corporations—Sewage Disposal System—Liability for Maintenance—Property Owners Permitted to Construct Drains Connecting with Municipal Sewer—Liability for Upkeep—Drain Passing under Street—Blocking—The Local Improvement Act, R.S.O. 1937, c. 269, ss. 56 et seq.

Where property owners are permitted by a municipality to construct drains connecting their premises with a municipal sewer, and do this work at their own expense, but under the supervision of the municipality, the municipality does not become liable for the upkeep of that part of the private drains which lies under the street. The right of the property owner is in the nature of an easement, and he is responsible for the maintenance of the drain, and cannot claim damages from the municipality if, without misfeasance on its part, the drain becomes blocked. *McConkey et al. v. The Town of Brockville* (1886), 11 O.R. 322, applied.

AN appeal by the plaintiff from the judgment of Kelly J., [1943] O.W.N. 461, [1943] 4 D.L.R. 357, dismissing the action. The facts are fully stated in the reasons for judgment.

24th April 1944. The appeal was heard by GILLANDERS, KELLOCK and LAIDLAW JJ.A.

J. Shirley Denison, K.C., for the plaintiff, appellant: Who is responsible for the roots of trees on the highway reaching and clogging up part of the drain, also on the highway and connecting with the town sewer? The tree from which these particular roots came was also on the street, but being declared to be appurtenant to the land adjacent to the highway, the trial judge held that the plaintiff had a proprietary interest in the tree which caused the damage; and it followed that there would be no obligation on the part of the defendant corporation to repair the damage, especially to the drain constructed by the plaintiff or his predecessors. If the finding of the trial judge is right, then this tree was, in effect, the plaintiff's tree. In the reasons for judgment, reference is made to The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, s. 14(1), in which the word "appurtenance" is used along with many other words at one time used in long-form conveyancing. That provision is applicable only to a conveyance. This tree was not made appurtenant by any conveyance but purely by the terms of s. 511 of The Municipal Act, R.S.O. 1937, c. 266, and that section does not make the adjacent landowner an owner of the tree, it only gives him an easement over it for certain limited purposes, namely, "for the purpose of shade or ornament". The

word "appurtenance" can have no wider meaning than that given it by the statute. The Tree Planting Act, R.S.O. 1914, c. 213, ss. 2 and 4, made the adjacent owner the owner of trees upon a highway, but concurrent municipal legislation restricted his rights markedly: *Hodgins v. City of Toronto, et al.* (1892), 19 O.A.R. 537. S. 511 of The Municipal Act abolished the anomaly of creating a statutory owner of trees on a highway with rights restricted as they were by former municipal Acts, and the owner's interest in the trees was described as an "appurtenance" in the true sense of "easement"; he was entitled to shade and ornament from them.

In the case at bar, since the appellant did not plant the tree, he has not even the right to any recompense if the town cuts it down. He is under no obligation to look after the roots of the tree. [LAIDLAW J.A.: The drain was built by the property owner; he has the permissive right to connect it with the sewer. Wherein, then, lies the duty of the municipality to keep a private drain free of obstruction? If I acquiesce in my neighbour putting a drain under my land, is there a duty on me to see that it is kept in good order?] The work was done as a local improvement, under what is now The Local Improvement Act, R.S.O. 1937, c. 269, and was paid for by the appellant's predecessor in title. The respondent corporation alone had the power to clear the drain from the tree roots, and by virtue of the Act it was obliged to do so. The mere fact that an owner connects his drain on the street with a sewer his predecessor has paid for is no evidence that the drain on the street remains his property or under his control. A sewer would perform no real "service" (as defined in The Local Improvement Act) if drains could not be connected with and become part of the "work": *O'Brien et al. v. Town of Collingwood*, [1934] O.W.N. 129. [KELLOCK J.A.: In the *Collingwood* case, there was an obligation upon the owner to connect the sewer.]

The trial judge made a very small allowance for damages, which in fact were quite substantial, if it is a case for damages.

F. C. Richardson, for the plaintiff, appellant: The onus rests upon the respondent to show that it was not negligent in this case. [GILLANDERS J.A.: You are asking this Court to go a long way in reversing a finding of fact.]

John Callahan, K.C., for the defendant, respondent: The trial judge was correct in finding that there was no liability on the part of the respondent in respect of the blockage of the appellant's drain under the respondent's property. This was caused by the roots of the appellant's own tree. The drain was constructed and maintained by the appellant and his predecessors in title at their own expense, and the respondent assumed no part of this undertaking. The respondent was not obliged to maintain or repair the drain, although it was on its property, because the drain was the private property of the appellant. If the drain had been part of an undertaking by the Town, and a local improvement, the situation would have been different. The respondent can only be held responsible for its own negligence after notice or knowledge, and the lapse of a reasonable time within which to remedy. The respondent's sewer was in fact not blocked, and the respondent had no notice or knowledge of the blockage in the appellant's drain. The respondent would be liable for misfeasance, but no action lies against the respondent for non-feasance: *Welsh et ux. v. The City of St. Catharines* (1886), 13 O.R. 369. The appellant, having secured the permission of the respondent to lay the drain, would have a right by necessity to excavate to repair the drain, and the respondent would have no right to refuse him permission. The right to excavate to repair the drain is a right incidental to the right to lay and maintain the drain, for the doing of which the appellant had the respondent's permission.

T. F. Hall, K.C., for the defendant, respondent. The appellant's predecessor in title built the drain. If proper materials had been used there would have been no trouble. Since he was guilty of negligence in failing to take the necessary steps to prevent a back-flow into his drain, the appellant cannot now call upon the respondent to protect him against the consequences of his own negligence.

J. Shirley Denison, K.C., in reply.

Cur. adv. vult.

16th May 1944. **GILLANDERS J.A.**: The plaintiff appeals from a judgment of Kelly J. dismissing his action brought against the defendant corporation for damages arising from the flooding of his basement. The appellant is the owner of a small apartment house located on property having a frontage of 117 feet

on King Street in the town of Cobourg, extending in the rear to the north side of Queen Street, and having a frontage there of some 55 feet 6 inches. King Street and Queen Street run east and west.

In the year 1903 the respondent corporation constructed, as a local improvement, an 8-inch vitrified pipe sewer down the centre of Queen Street, from Henry Street, nearly two blocks east of the plaintiff's property, to McGill Street, over a block to the west thereof. The by-law authorizing this work provides for the cost of the work being provided by a special rate assessed and levied on the property benefited thereby. At the time the sewer was constructed the building on the property now owned by the appellant was a school. It was connected by a drain to a sewer on King Street to the north, which carried all the sewage from the building. After the installation of the Queen Street sewer a drain was constructed from the property and connected with this sewer to carry rain water from the eaves, and also connected with the basement floor for drainage purposes, but no sewage was carried into this drain.

Appellant purchased the property in 1941, changing it into apartments. On 11th March 1942, he found water rising in his basement. Although he made what efforts he was able to, by bailing and pumping, to remove the water, it continued to come in until about 15th April. A portion of the basement in which the furnace, stoker and coal bin were located was some 12 to 14 inches below the floor of the remainder. The water rose above the lower portion of the basement, and the electric motor operating the coal stoker was burned out and stopped, and other damage was caused. The appellant immediately notified the respondent corporation, and men employed by him and employees of the corporation, without any admission of liability on the part of the corporation, made various searches for the source of this water and did work with a view to draining it off.

Appellant subsequently made a claim against the corporation for damages which he had suffered. This claim was declined, and he eventually brought this action. In his statement of claim appellant alleged that the 8-inch sewer on Queen Street, into which the corporation brought large quantities of water, was blocked at a point west of the appellant's property, and that this water backed up and caused the flooding of his basement.

In its defence the corporation denied that its sewer was blocked, and alleged that in any event no water could back up through the drain leading from the appellant's property to the sewer, because the appellant's drain was found to be blocked by matted roots. The corporation disclaimed liability for the water flooding the appellant's basement.

The trial judge has found as a fact that the Queen Street sewer was not blocked and did not cause the flooding in question. There was some evidence of roots being removed from the sewer by corporation employees. This was denied by the employees present at the time. There was evidence that at the time of the flooding the basements of two houses fronting on Queen Street in the vicinity of, but slightly east of, the appellant's property were dry. The floors of the basements in both these properties were below the level of that of the appellant's. The trial judge finds that if the water reached the same level as one foot in the appellant's basement, it would be two feet nine inches deep in one of these basements, and seven feet three inches in the other. There is evidence that these basements were connected, or thought to be connected, with the Queen Street sewer, but it is urged that this is based on an inference that the drains leading from these two basements are connected with the sewer, and that these drains are not blocked.

During the flooding the corporation's men, by appropriate means, found the Queen Street sewer clear of obstruction from a point considerably east of the appellant's drain connection to a point west of this connection. In addition to this there is evidence that flushing tests were made in the sewer. An opening was made in the sewer at the point where the appellant's drain connects. At the second street corner east of the appellant's drain connection is an automatic flushing tank, with a capacity of 323 gallons, which flushes at four hour intervals. It is said that this flush water was observed flowing freely westerly in the sewer past the opening where the appellants' drain connects. There is a fall of over eighteen feet in the sewer from the location of this flushing tank to the point where the observation was made.

Apart from any inference based on the absence of flood water in the basements of the two neighbouring properties mentioned, there is, I think, ample evidence to support the finding that

the Queen Street sewer was not blocked. It also seems clear from the evidence that the sewer in question was of ample capacity, and was in fact, at the place where the appellant's drain connected, freely carrying away the water it contained.

The distance from the southerly wall of appellant's building to the north side of Queen Street is said to be 218 feet, and the sewer runs down the centre of Queen Street, which is 66 feet wide. There is a fall of 10 feet in the appellant's drain, from where it leaves the building to where it connects with the sewer. Openings were made to locate and examine this drain at various places on the appellant's property, and at four points between the street line and where the drain connects with the sewer. The drain is 6 inches in diameter for some 9 feet from the sewer, and the remainder of it is a 4-inch drain. It was apparently of tile construction. At a point within a few feet of where it connected with the sewer it was found that this drain was badly obstructed and blocked up by roots which had found their way into the drain, and it is said the blocking at this point was sufficient to prevent the drain serving as an outlet to the sewer for waters collected in the appellant's basement. It seems common ground that the roots which caused the blocking of the drain at this point came from a tree which stands nearby on the boulevard outside the limits of the appellant's property.

Appellant urges (1) that the corporation is absolutely responsible for the maintenance of the portion of this drain lying in its road allowance; that failure to maintain the drain prevented the flood waters in the basement from being drained off, and (2) in any event, even if the corporation was entitled to reasonable notice of the condition, that it was negligent in not providing a remedy after being given notice on 11th March. These contentions raise the question as to what obligation, if any, rested on the respondent corporation respecting this drain, or at least that portion of it from the street line to the sewer connection.

There is no specific evidence to show by whom, or under what arrangement, the particular drain from the appellant's property to the sewer was constructed, but there is evidence of the Corporation Clerk that it has been the practice for many years for a property owner, wishing to connect a private drain with a sewer, to get a permit to do the necessary work in the

highway. The work is then done by, and at the expense of, the private owner, but under the supervision and to the satisfaction of the Streets Department of the corporation. This is confirmed by the evidence of James Campbell, who has been since the year 1905—and still is—in the service of the corporation as street inspector. It may be assumed that the drain was installed in accordance with the regular practice, *i.e.*, a permit secured to connect and do the work, and the work done by and at the expense of the private owner under the supervision of the corporation's agents. The corporation not having itself constructed any part of the drain, and having merely given permission to the private owner to connect the drain with the sewer, and do the necessary work on the highway for this purpose, I cannot conclude that the drain was part of the local improvement work authorized and constructed by the corporation. It follows that the liability of the corporation in respect of the sewer constructed as a local improvement is not, therefore, necessarily the measure of its duty respecting the maintenance of any part of the drain in question. I think the limit of the corporation's liability respecting the drain, under the circumstances, may be succinctly stated in the words of Chief Justice Cameron (not used with reference to exactly the same circumstances, but still applicable) in *McConkey et al. v. The Town of Brockville* (1886), 11 O.R. 322 at 327:

"The principles that should govern in such a case are more like those applicable to the rights and obligations upon parties who avail themselves of a drain dug upon private property. In which case I take the law to be, there is no obligation to keep the drain free from obstruction on the part of the owners of the soil through which it passes. He who enjoys the easement or privilege is bound to repair the drain and remove the obstruction, and the owner of the soil would only be liable for some act of misfeasance injuring those above or below him. Non-feasance carries with it no responsibility."

See also *Welsh et ux. v. The City of St. Catharines* (1886), 13 O.R. 369. This case is referred to in *O'Brien et al. v. Town of Collingwood*, [1934] O.W.N. 129. Vide also *Gallagher v. City of Toronto* (1907), 9 O.W.R. 310, affirmed 9 O.W.R. 696.

It is not necessary here to consider, in respect of the appellant's drain, whether the duty of repair imposed by s. 56 and

the following sections of The Local Improvement Act, R.S.O. 1937, c. 269, if applicable, imposes an absolute duty to keep in repair, or liability in negligence for failure to repair, after knowledge and notice of non-repair, such as was discussed in *The City of Vancouver v. Cummings* (1912), 46 S.C.R. 457, 2 D.L.R. 253, 2 W.W.R. 66, 22 W.L.R. 164. That would only extend to work undertaken by the corporation, and would not extend to the appellant's drain, which was not part of the work undertaken, but in respect of which permission to connect only was given.

Even if a duty to repair, after knowledge or notice, applied, the circumstances here would indicate no liability on the corporation. No previous trouble had been experienced. The condition of the drain was not known to either party, and the corporation co-operated in investigating, locating and removing the obstruction in the drain beneath the highway.

The learned trial judge gave consideration to the argument that because the drain was blocked by roots of the tree growing on the side of the highway some 8½ feet south of the northerly limit of Queen Street, the corporation was liable for the blocking. After consideration of s. 511 of The Municipal Act, R.S.O. 1937, c. 266, he was of opinion that the tree in question being, by virtue of subs. 3 of s. 511, appurtenant to the land adjacent to the highway, it belonged to the appellant, and no obligation rested on the corporation for the damage to the drain. Subs. 4(f) of s. 511 empowers the council of every municipality to pass by-laws causing any tree "planted upon a highway" to be removed upon ten days' notice to "the owner of the tree". Keeping in mind subs. 2, permitting any person to plant trees on a highway with the approval of the municipality, it is noted that subs. 4(f) is limited to any tree planted upon the highway. There is no evidence that this tree was planted by any person, and I would hesitate to hold that the provisions of this section, respecting trees planted or left growing for the purpose of shade or ornament, and made appurtenant to the adjacent land, confers ownership on the adjoining landowner for all purposes. The result, however, is not to impose liability on the corporation. Permission having been given to the adjoining landowner to connect his private drain with the sewer, the obligation was on him to construct the drain of such material as would prevent

tree roots from entering, if there was any danger of that occurring, or to see to it that the drain was kept open.

There may be some doubt as to the source of the water which came into appellant's basement. It is sufficient, however, to conclude that it has not been established that it was brought there artificially by any wrongful act of the corporation. It seems quite apparent that there was no outlet for this water through the appellant's private drain to the Queen Street sewer. If this drain had been kept open from the basement to the sewer in question, there seems no reason to think, keeping in mind the evidence as to the condition of the sewer and the fact that there was a fall of 10 feet from the basement floor to the sewer, that the water would not readily have drained away.

The appeal must be dismissed, with costs if demanded.

KELLOCK J.A.:—In my opinion the finding of the learned trial judge that the Queen Street sewer was not obstructed is well founded and ought not to be disturbed. The appellant, in the alternative, seeks to hold the respondent liable for the flooding of his premises on the basis of the finding of the learned trial judge that the appellant's drain was blocked by tree roots between the street line and the point where the drain empties into the main sewer.

At the time of the passing of the by-laws under which the relevant portion of the Queen Street sewer was constructed, the council, in estimating the cost of making any sewer, might include the cost of branch drains from the sewer to the street line as part of the cost of the local improvement: R.S.O. 1897, c. 223, s. 673(1); 1 Ed. VII, c. 26, s. 30. Evidently the work in question was done under the provisions of subs. 4 of s. 668 of the Act of 1897, the predecessor of R.S.O. 1937, c. 269, s. 9, but it is not shown that the council availed itself of the power given to it by subs. 1, of s. 673. In fact the plan of the sewer (Ex. 3) would appear to indicate that branch drains were not part of the work. This plan shows offshoots from the main sewer extending a few feet north and south of the main sewer, evidently for the purpose of affording means of connecting private drains, but these do not extend to the street line. The evidence shows that the blocking took place not only close to the main sewer but near the street line also. At this point alone the drain pipes were completely blocked by roots so that water

could not get up or down. That water remained in the respondent's cellar was evidently due to the fact that it could not find an outlet through the drain into the sewer. The fact that the drain was also blocked lower down at the offshoot becomes unimportant, as the appellant has not shown that this was a cause of his damage at all, and the onus was upon him.

In my opinion, whatever might have been the liability of the respondent in respect of the blocking of the offshoot standing by itself, the respondent is under no liability by reason of the blocking of the drain for the remainder of its course under the highway. The evidence establishes that, since 1905 at least, the construction of private drains to connect with sewers under highways in the respondent municipality has been the voluntary act of the property owner with the permission of the municipality. The plan (Ex. 3) already referred to would indicate that the drain here in question was not installed by the respondent, and that the proper inference is that it was constructed merely with the respondent's permission. Accordingly, on the authority of *McConkey et al. v. The Town of Brockville* (1886), 11 O.R. 322, the respondent, in my opinion, is under no liability to the appellant. I do not consider it necessary to deal with the ground upon which the learned judge rested his judgment with respect to this part of the appellant's claim.

I would dismiss the appeal with costs.

LAIDLAW J.A.:—The plaintiff appeals from a judgment of Kelly J., dated 23rd June 1943, whereby he dismissed an action brought by the plaintiff for damages alleged to have been suffered by him as a result of water backing up into his basement through a drain pipe leading from there and connected with a sewer pipe on Queen Street in the town of Cobourg.

The plaintiff claimed in his statement of claim that the damages were caused by "the negligence and wrongful acts of the Defendant Corporation . . . namely:

"(a) Negligence in construction, maintenance and operation of the sewer on Queen Street.

"(b) Flooding the lands of the Plaintiff.

"(c) Bringing additional water on to the Plaintiff's land.

"(d) Failure to have proper and sufficient equipment to maintain said sewer.

"(e) Trespass.

"(f) Failure to inform the Plaintiff of the true cause of the flooding."

Queen Street runs east and west, and the part of the sewer in question was constructed as a local improvement under authority of a by-law of the municipality passed on the 4th day of May 1903. There is no evidence of negligent construction, but on the contrary it is beyond controversy that the sewer was properly built by the defendant corporation. The drain leading from the plaintiff's cellar was in existence before and at the time the construction of the sewer was completed, and was connected to it some time afterwards.

The learned trial judge finds:

(1) That the plaintiff's drain was blocked by roots between the point of emptying into the sewer and the street line of the plaintiff's property.

(2) That a large tree on the street in front of the plaintiff's property, and situate only a few feet from the drain, caused the blocking of the plaintiff's drain.

(3) That the Queen Street sewer was not blocked and did not cause the flooding of the plaintiff's basement.

The learned judge concluded that "the flooding of the plaintiff's basement did not result from the blocking of the sewer" because two other basements in the neighbourhood ("the Niven and Dick") were dry when the plaintiff's basement was flooded. It is argued that such conclusion has not a sufficient foundation in evidence; that it does not appear that the Niven and Dick basements would necessarily be flooded by the alleged blockage in the Queen Street sewer at the same time as the plaintiff's basement was flooded; in particular that there is no evidence to show whether or not the drains from those properties had mechanical devices of some kind to prevent such a happening; and that the evidence of comparative levels of the outlets of the three properties is unsatisfactory.

I have read the evidence with care, and have decided that this Court should not give effect to these objections made on behalf of the appellant. I think there is ample evidence to justify the conclusion of the learned trial judge, apart altogether from the basis stated by him. There is no reason to reject the evidence given on behalf of the defendant, showing satisfactorily that the Queen Street sewer was not blocked and did not cause

flooding of the plaintiff's basement. That finding of fact ought to be accepted. But, even if the Queen Street sewer was blocked, the plaintiff could not, in my opinion, make the defendant liable in law for the damages sustained by him in the circumstances of this case. The essentials to establish such liability have not been shown. It has been held in *Welsh et ux. v. The City of St. Catharines* (1886), 13 O.R. 369 at p. 379, per Cameron, C.J.:

"To make a corporation liable for injury from the overflow of a drain I think it must be shewn affirmatively that the corporation required the property owners to use the public drain by connecting the private drains therewith. secondly, that the drain or sewer has been improperly and negligently constructed and injury results in consequence of such negligent and improper construction, or that the same has become obstructed and the corporation has negligently omitted to remove the obstruction within a reasonable time after knowledge or notice of the obstruction, and injury results to the plaintiff after such reasonable time for removal after such knowledge or notice has been had by the corporation; or, third, the corporation brings to the plaintiff's land by means of the drain or sewer more water than would otherwise come to the same, and pours it wilfully upon the said land, or after bringing the water to the land negligently allows it to escape and flow over the land."

I accept the findings that the drain from the plaintiff's premises was blocked by roots of a tree situate on Queen Street, and the blockage was between the point of emptying into the sewer and the street line of the plaintiff's property. It is argued that the defendant is responsible in law for damage caused to the plaintiff by this condition. The appellant submits "that the drain to the sewer is as much part of the sewer as the main branch itself when once connected"; "when once connected the pipes become part of the soil and freehold of the highway"; that the drain forms part of a work undertaken as a local improvement which must by statute be "kept in repair by and at the expense of the corporation": R.S.O. 1937, c. 269, s. 56; and that "the mere fact that an owner connects his drain on the street with a sewer he or his predecessors has paid for is no evidence that the drain on the street remains his property under his control." It is necessary to consider the nature of

the right possessed by the plaintiff to lay the drain under the highway and connect it with the sewer. He was not bound to build it and was under no obligation to connect it with the sewer. He was free to dispose of waste water by whatever means he might think best. The defendant corporation did not require him to make use of the sewer. He was entitled to do so as a privilege. His right was permissive in character. The procedure on the part of an owner desiring to connect a drain to the sewer was to apply to the corporation for a "permit", which, when granted, enabled the owner to make the connection with his own materials and labour and at his own expense, subject only to supervision of a representative of the corporation. The right acquired by the owner was in the nature of an easement. It was in the class of "accessorial rights which confer merely a convenience to be exercised over the neighbouring land": Gale on Easements, 11th ed., p. 1. The privilege exercised by the plaintiff to lay a part of a drain under the highway and connect it with the sewer did not impose an obligation on the defendant to maintain that part. The rights and obligations of the parties are determined by the application of well-known principles. ". . . where I grant a way over my land, I shall not be bound to repair it": *Pomfret v. Ricroft* (1669), 1 Saund. 321 at p. 322a, 85 E.R. 454, quoted by Cameron C.J. in *McConkey et al. v. The Town of Brockville* (1886), 11 O.R. 322 at p. 328. Coleridge J., in *Duncan v. Louch* (1845), 6 Q.B. 904 at 910, 115 E.R. 341, says "if he wants the way to be repaired, he must repair it himself." Cameron C.J., in *McConkey v. Corporation of Brockville*, *supra*, at p. 327, says: "He who enjoys the easement or privilege is bound to repair the drain and remove the obstruction, and the owner of the soil would only be liable for some act of misfeasance injuring those above or below him. Non-feasance carries with it no responsibility." There is no evidence of misfeasance or of non-feasance on the part of the defendant.

It follows from what I have said that the argument of appellant's counsel must fail. The drain did not become part of the sewer, nor of the work undertaken as a local improvement. It did not form part of the "soil and freehold of the highway" but on the contrary remained his property, subject to such maintenance as he chose to give to it. I think the defendant could not prevent him from making repairs to the drain on the

part underlying the highway, and he was entitled to enter on the highway for that purpose. If he elected to do so he could discontinue use of the drain at any time he chose. Likewise he could allow it to fall into a state of disrepair, but he could not hold the defendant liable for damages resulting from such condition, nor impose any duty on the corporation to keep the drain in a fit condition to serve the plaintiff's purposes and use.

I do not find it necessary to discuss the grounds upon which the learned trial judge based his judgment, but for the reasons I have given the appeal ought to be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: Fred C. Richardson, Cobourg.

Solicitor for the defendant, respondent: Thomas Field Hall, Cobourg.

[COURT OF APPEAL.]

Ferguson et al. v. The City of Toronto.

Municipal Corporations—Borrowing for Local Improvements—Sale of Debentures—Greater Sum Realized than Estimated Cost—Position as to Surplus—Resulting Trust—Persons Entitled to Share—The Local Improvement Act, R.S.O. 1937, c. 269, ss. 20, 38, 39, 44, 47, 49, 54.

Where a municipality, having undertaken a work as a local improvement, finances it by issuing debentures in the amount of the estimated cost, imposing, upon the properties specially assessed, a special rate sufficient to meet the property owners' share of the estimated cost during the period of the debentures, and where, because of a favourable market, the sale of the debentures realizes a surplus over the estimated cost, the municipality becomes a trustee of that surplus, and the persons who contribute to the cost by paying the special rate are entitled to share therein. The municipality is not entitled to apply the surplus to its general revenues, for the benefit of all its taxpayers generally. Nor (apart from the 1941 legislation referred to below) can the surplus be applied to wipe out or reduce the final instalment or instalments of the special rate. This special rate is imposed once for all by the debenture by-law, and is for the protection of the debenture holders, and it must therefore be collected in each year, as provided for in the by-law. At the end of the period, if not earlier dealt with, the surplus must be distributed among all persons who have paid the rates levied under the debenture by-law throughout its existence, and the municipality must account to these persons for such proportion of the excess received as the property owners' contributions to the payment of the debentures bears to the total amount paid. S. 49(9) of The Local Improvement Act, R.S.O. 1937, c. 269, added by 1941, c. 27, s. 2, now makes provision for applying such an excess *pro tanto* to payment of the rates to be levied under the debenture by-law, but this subsection cannot apply to debentures issued, and a rate imposed, before 1941.

Per ROBERTSON C.J.O. and GILLANDERS J.A.:—Although local improvement rates are, for convenience, collected in the same way as ordinary taxes, they are not taxes in the ordinary sense of the term. The municipality uses its statutory powers, such as those of expropriation and of doing work on the public highways, and its borrowing powers, for the special purpose of executing a public work for the special benefit or service of a particular locality within its jurisdiction, and of providing for the cost. It then proceeds to make a special assessment and to raise the money either by immediate levy, by borrowing, or by the issue of debentures. In all of this it acts as an agent or trustee, collecting the cost of services rendered, and the disbursements made by it, from the persons on whose behalf the money has been expended. There is nothing in the Act which relieves the municipality from the obligation, arising from its character of trustee, to account for an excess amount derived from the sale of the debentures issued for the cost of the work to the payment of which the property owners must contribute.

Per KELLOCK J.A.:—Once the special assessment roll has been made and confirmed, and the by-law levying the special assessment has been passed, there is, except for the 1941 amendment, no provision by which the machinery, thus set in motion, for the collection of the rates upon this special assessment, can be interfered with. *City of Ottawa v. Ottawa Public School Board* (1923), 54 O.L.R. 633 at 635, applied.

AN appeal by the defendant from the judgment of Hope J., [1943] O.R. 815, [1944] 1 D.L.R. 293, in favour of the plaintiff. The facts are fully stated in the reasons for judgment.

3rd March 1944. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and KELLOCK JJ.A.

F. A. A. Campbell, K.C., for the defendant, appellant: The appellant had the right to include in the 1943 tax levy and tax bills the sum of \$74,929.83: *The Local Improvement Act, R.S.O. 1937, c. 269, ss. 3, 8, 39, 41-44, 47 and 52; The City of Toronto v. The Toronto Transportation Commission*, [1937] O.R. 42, [1937] 1 D.L.R. 522, 46 C.R.C. 34; *City of Ottawa v. Ottawa Public School Board* (1923), 54 O.L.R. 633. The appellant's dealing with the surplus funds, the subject of this action, was in the interests of the ratepayers as a whole and not without authority. The whole purpose of this litigation is to get money back for ratepayers. The respondent wants half of \$34,000 for people specially assessed. If the City has to refund these amounts, it will bring about an inequality of taxation which is contrary to the provisions of *The Assessment Act, R.S.O. 1937, c. 272, ss. 2 and 3*, and *The Municipal Act, R.S.O. 1937, c. 266, s. 315; The Attorney General of Canada v. The City of Toronto* (1893), 23 S.C.R. 514.

The trial judge erred in his interpretation of s. 319 of *The Municipal Act, R.S.O. 1937, c. 266*, s. 49(5) of *The Local Improvement Act, R.S.O. 1937, c. 269*, and s. 13(c) of *An Act Respecting*

the City of Toronto, 1917, 7 George V, c. 92. The rebating of the surplus funds would bring an advantage to some ratepayers over others, as the owners of lands specially assessed have already received the benefit of the reduction in taxation by reason of the distribution from the fund set up and known as "The Completed Local Improvement Reserve".

J. R. Cartwright, K.C., for the plaintiff, respondent: Is the City entitled to dispose of this surplus \$34,000 in the manner in which it is accustomed to deal with such funds, or is the respondent correct in claiming that the benefit of half of it should go to the assessed properties? The scheme of The Municipal Act, R.S.O. 1937, c. 266, and of The Local Improvement Act, R.S.O. 1937, c. 269, is a simple one, simply expressed. They say in terms that the money raised shall be used for specific purposes, not general ones. Either under the statute or under the common law, when such money is collected, the City is subject to a resulting trust. The trial judgment only says these surplus moneys should be returned or used for the benefit of those who contributed. The amendment to The Local Improvement Act, *supra*, as effected by (1941) 5 Geo. VI, c. 27, s. 2, was simply declaratory of existing law, not new law. *In re Hallett's Estate; Knatchbull v. Hallett* (1879), 13 Ch. D. 696, is authority for the proposition that if a person who holds money as a trustee or in a fiduciary character pays it to his account at his bankers and mixes it with his own money, and afterwards draws out sums by cheque in the ordinary manner, he must be taken to have drawn out his own money in preference to the trust money. Here, in contemplation of law, the money is still in the hands of the City. [ROBERTSON C.J.O.: The City has itself used the money, to pay obligations of its own.]

F. A. A. Campbell, K.C., in reply: If the Court comes to the conclusion that this money should be refunded, then it should, if possible, be determined who has benefited up to the present, and such benefit should be taken into consideration.

Cur. adv. vult.

17th May 1944. ROBERTSON C.J.O.:—This is an appeal from the judgment of Hope J., dated 24th November 1943. The action arises in connection with the widening of Yonge Street from Lawton Boulevard to the northern city limits, which the appellant, the municipal corporation, undertook as a local improve-

ment. The work was done under by-law passed on 7th July 1921. A portion of the cost, called the "owners' portion", was assessed upon the properties fronting upon or immediately benefited by the work, and the remainder of the cost was borne by the appellant. Debentures for the cost of the work were issued under by-law passed on 24th March 1924. The appellant realized from the sale of the debentures issued under this by-law a sum of \$33,772.25 more than it had estimated in computing the cost of the work. This sum was not placed by the appellant to the credit of the work, nor was any part of it refunded to the property owners who contributed to the payment of the debentures, but it was applied by the appellant upon other accounts of the municipality, and this resulted in a reduction in the annual general rates levied upon the whole body of its taxpayers.

The debentures issued for the cost of the work were payable in yearly sums during the period of twenty years, in such amounts that the aggregate amount payable for principal and interest in each of the twenty years was equal, one year with another. The last of the debentures fell due in 1943, and the appellant proposed in that year to levy the annual sums for the "owners' portion" upon the properties specially assessed, as in the preceding nineteen years. There was another amount of \$42,177.12, by which the actual cost of the work fell below the estimated cost, for the amount of which the debentures had been issued. This amount also the appellant had applied otherwise than to the special account of this work, and, as in this instance, specifically directed by s. 44(3) of The Local Improvement Act, R.S.O. 1937, c. 269. After the commencement of this action the appellant, by way of complying with s. 44(3), reduced the tax bills for the properties liable for the special rates for this work, by crediting thereto a proportion of one-half of the sum of \$42,177.12. This appears to have been regarded by the respondent as a compliance with s. 44(3), and any question with respect to this second sum seems to have been dropped. Whether or not the reduction of the tax bills for the year 1943 was an application "*pro tanto* to payment of the rates to be levied under the by-law", as the statute directs, may be open to question, for it disregarded any persons who had paid in earlier years the rates levied under the by-law for this work. We are not concerned, however, on this appeal with any question in respect of

this second sum, but only with the excess sum of \$33,772.25 realized by the sale of the debentures.

The action was brought for a declaration that the appellant was not entitled to make, in the year 1943, the levy provided by the debenture by-law in respect of this local improvement, and for an injunction restraining the appellant from making such levy, or from sending out tax bills including such levy. By agreement between the parties the action was disposed of upon motion, without pleadings, made before Hope J. in court.

By his judgment disposing of the action, Hope J. declared that the appellant was not entitled to include in the levy for the year 1943, or in the 1943 tax bills issued by it, the twentieth instalment falling due under the debenture by-law aforesaid, or any part thereof. The learned judge held that the appellant was not entitled to apply the sum of \$33,772.25, which it had received on the sale of the debentures in excess of the amount estimated, upon other accounts of the appellant, but was bound to apply the same to the special debt existing in respect of the local improvement in question. He held that a resulting trust arose in respect of the sum so received by the appellant, and that the owners of the properties specially assessed, who had contributed to the payment of the debt, were beneficiaries of that trust.

I shall deal first with this principle laid down by the learned judge, and shall then discuss the terms of the formal judgment.

In my opinion the learned judge was right in his conclusion that a resulting trust arose in respect of the sum received by the appellant, on the sale of the debentures, in excess of the amount estimated in computing the cost of the work. It is a conclusion that has a sound basis in the very nature of the local improvement system, and is not excluded by any of the provisions of The Local Improvement Act. The municipality, having secured authority, by statute or by petition of the property owners specially affected, or however it may be, undertakes to construct or execute a public work for the special benefit or service of a particular locality within its jurisdiction, on the terms that the municipality shall assess and levy either the whole or a proportion of the cost of the work upon the lands fronting upon the work, or immediately benefited by it. The municipality uses its statutory powers, such as its powers of

expropriation and of doing work on the public highways, and its borrowing powers, for this special purpose of doing the work and providing for its cost. It then proceeds to specially assess the properties that are to contribute to the cost of the work, each for its proper share of the cost, and then to raise the money necessary to discharge that cost by immediate levy, or by borrowing, or by the issue of debentures. In all of this the municipality acts as an agent or trustee in so far as the owners of the properties to be specially assessed are concerned. Even in respect of the collection by the municipality of their share of the cost from the owners of the properties specially assessed, it has been said that local improvement rates are not taxes in the ordinary sense of the term, and that in their collection the municipality is in the position of an agent or trustee collecting the cost of services rendered and the disbursements made by it, from the persons on whose behalf the money has been expended. For purposes of convenience The Local Improvement Act provides, in s. 54, for the use of the machinery of The Assessment Act, R.S.O. 1937, c. 272, in the collection of rates imposed under the first-mentioned Act, but their fundamental character is not altered thereby. Much that is both interesting and instructive upon the local improvement system generally, and with special application to this Province, is to be found in the notes upon the local improvement sections (as formerly contained in The Municipal Act) in the Municipal Manual of the late C. R. W. Biggar, K.C., a work that, although published in 1900, is still both useful and authoritative. I refer, for the present purpose, particularly to p. 893 and following pages, and to p. 424. I also refer to Cooley on Taxation, 4th ed., s. 31, and to *Los Angeles County Flood Control District v. Hamilton* (1917), 177 Cal. 119; 169 Pac. 1028.

Notwithstanding such special provisions of The Local Improvement Act as s. 44(2) and ss. 58 and 59, which impose specific burdens in certain cases upon the municipality, there is not, in my opinion, anything to be found in the statute that relieves the municipality from the obligation, arising from its character of trustee, to account for an excess amount derived from the sale of the debentures issued for the cost of the work, to the payment of which the property owners assessed must contribute. Neither, in my opinion, has the provision of s. 47, that the certified assessment roll shall be valid and binding upon

all persons concerned, the effect of relieving the municipality of the obligation to duly account for such a sum as that in question here. To hold otherwise would enable a municipality, after the completion of the work, the ascertainment of the cost as provided in s. 43, and the certifying of the assessment roll, to make a profit for itself by fixing a rate of interest on the debentures that would ensure a price higher than par on their sale. Nothing less than an express provision of the statute to that effect should entitle the municipality to disregard the interest of the owners of the properties specially assessed in any sum received from the sale of the debentures in excess of the amount required to discharge the cost of the work.

There has been inserted in the statute, by The Local Improvement Amendment Act, 1941, c. 27, s. 2, a provision that deals specifically with this matter, but it is conceded that this new provision cannot affect the present case. The provision appears to recognize the principle above stated, and is as follows:

"2. Section 49 of The Local Improvement Act is amended by adding thereto the following subsection:

"(9) If the amount realized from the debentures exceeds the amount of the cost of the work, the excess sum shall be applied *pro tanto* to payment of the rates to be levied under the by-law providing for the issue of the debentures."

While I agree with the learned judge as to the principle to be applied to determine the relationship between the appellant and the owners of the specially assessed properties, in respect of the excess sum received, I am not able to agree in terms with the declaration made by the judgment. In the first place, the rates assessed in respect of this local improvement, and payable in 1943, were imposed by the debenture by-law passed in 1924. All that remained to be done in 1943 was to collect them when they fell due, as also provided by the debenture by-law of 1924. These special rates are declared, by s. 49(5) of The Local Improvement Act, to form a special fund for the payment of the debentures. These rates are imposed once for all, and are for the security of the debenture holders. The fact that the municipality has received from the sale of the debentures an excess sum, in which the owners of the properties specially assessed are entitled to share, does not, apart from a specific

provision in the statute, warrant any interference with the collection of the special rate. The Act of 1941 does make such a specific provision, but it has no application here.

The judgment should not, therefore, have interfered with the collection of the special rate. The right of the respondent in respect of the amount for which the appellant is accountable is, in my opinion, the right to share in its distribution among the persons who have paid the rates levied under the debenture by-law. That means all the rates, not only the rates for 1943. The appellant should account to the property owners only for such proportion of the excess received from the sale of debentures as the property owners' contributions to the payment of the debentures bear to the total amount paid. Account will have to be taken of any sums paid by property owners who commuted the assessment made upon their properties under clause VI of the debenture by-law. Both the present owners and former owners will have to be brought in (see s. 66). Tenants who have paid the special rates may also be entitled to share, and particularly any tenants who come within the definition of "owner" in s. 1(o). All this accounting would have been avoided if the appellant had made the proper application of the sum in question on its receipt.

I concur in the formal disposition of the appeal, and in the order as to costs, as stated in the reasons for judgment of my brother Kellock.

GILLANDERS J.A.: I agree with ROBERTSON C.J.O. and have nothing to add.

KELLOCK J.A.: This is an appeal by the defendant from the judgment of Hope J., dated 24th November 1943, made on motion declaring the appellant not entitled to levy certain local improvement rates in the year 1943.

The respondent is the present owner of certain properties in the city of Toronto specially assessed in 1924 and subsequent years for the cost of widening Yonge Street. By by-law 9999, passed by the city council on 24th March 1924, provision was made for borrowing, on the credit of the corporation, the sum of \$933,791.31 for the purposes of this work, and for the issue of debentures therefor payable in twenty annual instalments. The by-law provided that during the currency of the debentures

there should be raised annually for the payment of the owners' portion of the cost of the work, fixed at one-half the total amount, the sum of \$37,464.91, and an equal amount for the payment of the corporation's portion of the cost. For payment of the owners' portion of the cost the by-law provided, pursuant to the provisions of The Local Improvement Act, R.S.O. 1937, c. 269, for a special assessment upon certain lands and for the levying of the necessary rates thereon during each of the twenty years, at a certain rate per foot frontage. It also made provision, should any person liable so desire, for the commutation of such annual rates in accordance with the provisions of subs. 3 of s. 52 of The Local Improvement Act. This by-law provided for the levying of these rates throughout the full period of twenty years. The annual by-laws by which the appellant corporation raised the necessary moneys to meet current expenditure year by year did not, although the endorsement on the writ erroneously assumes that they did, include any part of these local improvement rates. The judgment in appeal follows the endorsement on the writ in this respect.

By reason of a favourable sale of the debentures, the sum of \$33,772.25 was realized over and above what was estimated. The writ in this action was issued on 7th May 1943. By the endorsement on the writ, the respondent claimed: (1) a declaration that the appellant was not entitled to include in the 1943 levy the annual instalment falling due in 1943 under by-law 9999; (2) a declaration that the by-laws of 22nd March 1943, in so far as they provided for levying such annual instalment, were illegal and invalid; (3) an injunction restraining the appellant from sending out any tax bills which included the amount of the annual instalment; and (4) an interim injunction. The writ was followed by service of notice of motion for an interim injunction returnable on 13th May 1943, but by arrangement between counsel the motion was not gone on with, and it was arranged that a motion for judgment might later be made without delivery of pleadings and that the respondent should not be prejudiced by not having proceeded with the motion for an interim injunction.

By the judgment in appeal it is declared that the appellant was not entitled to include in the levy for the year 1943 the

annual instalment under by-law 9999 already referred to. The appellant was directed to pay the costs of the action.

Under the provisions of s. 20(1) of The Local Improvement Act, it is provided that except where express provision otherwise is made in the Act the entire cost of a work undertaken is to be specially assessed upon the lots abutting directly on the work, according to the extent of their respective frontages thereon, by an equal special rate per foot frontage. By s. 38(1), it is provided that where the owners' portion of the cost is to be specially assessed upon the lots abutting directly on the work by a special per foot frontage rate, the council, before passing the by-law for undertaking the work, must procure, among other things, an estimate of the cost of the work, a statement of the share or proportion of the cost which should be borne by the land abutting directly on the work and by the corporation respectively, and a report as to the number of instalments by which this special assessment should be payable. S. 39 requires the council, before imposing the special assessment, to make a special assessment roll showing the lots to be specially assessed, with the name of the owner, the number of feet frontage, the rate per foot of the proposed assessment, and the number of instalments by which the said assessment is to be payable.

The statute also makes provision for the holding of a Court of Revision, and by s. 43 it is provided that a statement showing the actual cost of the work, verified as therein mentioned, is to be placed in the possession of the chairman of the Court of Revision. S. 44(1) requires that in ascertaining the actual cost of the work under s. 43, where, in the opinion of certain municipal officials, the cost of any unfinished portion of the work and any unsettled claims for lands taken or injuriously affected, will not exceed 25 per cent. of the total estimated cost, these officials may estimate these items and include the amount in the actual cost to be certified under s. 43. Subs. 2 of s. 44 provides that if the cost so estimated is exceeded, the excess is to be borne by the corporation. And subs. 3 provides that if the actual cost, including unsettled claims, is less than the estimated cost, the balance remaining in the hands of the municipality is to be applied *pro tanto* to payment of the rates to be levied under the by-law.

By s. 47, the special assessment roll, when corrected to give effect to the decisions of the Court of Revision, except as it may be amended on appeal, and the special assessment itself, are made binding upon all persons concerned and upon the land specially assessed.

By s. 49(2), authority is given to the council, when the work is completed, to borrow on the credit of the corporation to take care of the cost and to issue debentures therefor. S. 52(1) requires the council to impose upon the land liable therefor the special assessment with which it is chargeable in respect of the owners' portion of the cost. The subsection provides that the same "shall" be payable in such annual instalments as the council shall prescribe, and, as already mentioned, subs. 3 enables the council to prescribe the terms and conditions upon which any owner may commute the special rates imposed with respect to his land.

By s. 54 the provisions of The Assessment Act, R.S.O. 1937, c. 272, as to the collection and recovery of taxes, and the proceedings which may be taken in default of payment under that Act, are made applicable to the special assessments and the special rates levied thereon.

Under these statutory provisions, once the special assessment roll has been confirmed by the Court of Revision and on appeal, and the by-law levying the special assessment has been passed, there is no provision by which the machinery thus set in motion for the collection of the rates upon this special assessment may be interfered with. To adopt the language of Riddell J., as he then was, in *City of Ottawa v. Ottawa Public School Board* (1923), 54 O.L.R. 633, at 635, "There is no provision for the case of land once liable for the tax ceasing to be such", nor is there any provision authorizing the Court to interfere with its collection. In fact, by the provisions of s. 312 of The Municipal Act, R.S.O. 1937, c. 266, made applicable by s. 49(4) of The Local Improvement Act, the council is prohibited, once the debenture debt has been contracted, from altering the by-law "so as to diminish the amount to be raised annually", and also "shall not apply to any other purpose any money of the corporation which has been directed to be applied" to payment of the debt. Nothing could be clearer than that all the rates provided for by by-law 9999 must be paid, and their collection

is not to be restrained. Reference may also be made to s. 50(3) of The Local Improvement Act.

The surplus realized on the sale of the debentures in 1924 is one thing, and the amount to be raised each year by taxation is quite another. It is the former with which these proceedings are concerned.

Counsel for the respondent has referred us to two subsections of The Local Improvement Act and to a section of The Municipal Act. Subs. 3 of s. 44 of The Local Improvement Act is first referred to. This provides that "If the cost of such unfinished work and unsettled claims is less than the estimated cost, the balance remaining in the hands of the municipality shall be applied *pro tanto* to payment of the rates to be levied under the by-law." The sum of \$33,772.25 in question here is not the difference between the actual cost of the unfinished work and the unsettled claims and the estimated cost at all, but is an entirely different amount, namely, an amount received by the respondent in excess of the estimated cost. Accordingly this subsection has no application.

Counsel next referred to subs. 5 of s. 49 of the same Act, which reads as follows: "The special rates imposed for the owners' portion of the cost shall form a special fund for the payment of the debentures issued under the authority of subsection 2 and the interest thereon and shall not be applicable to or be applied for any other purpose." This subsection, again, has nothing to do with the amount here in question, as it deals with money arising from the payment of the rates, not with a surplus arising on the sale of the debentures in 1924. This subsection tends against, rather than for, the argument on behalf of the respondent, as it contemplates payment of the special rates throughout the entire period during which they are to be assessed, and their application to the payment of the debentures. It accordingly supports the view that the statute contemplates that the special rates must be paid, and must be applied in payment of the debentures issued under the authority of by-law 9999.

Counsel for the respondent next referred to s. 319 of The Municipal Act, which reads: "Money received by any municipal corporation from the sale or hypothecation of any debentures shall be kept in a separate account and shall be used only for

the purposes for which the same was raised and shall not be applied towards payment of the current or other expenditure of the municipality." This section was first enacted in the year 1927 by 17 Geo. V., c. 61, s. 25, and can have no application to moneys received and dealt with by the appellant in the year 1924.

It appears that the surplus here in question, when realized, was transferred by the appellant to a special sinking fund known as the "Completed Local Improvement Reserve" and that in so doing the appellant purported to act pursuant to authority conferred upon it by An Act Respecting the City of Toronto, 1917, 7 Geo. V, c. 92, s. 13(c), which reads as follows:

"13. The said corporation may:

"(c) Transfer to the sinking fund, from time to time, the unrequired balance of any loan which may have been secured through the issue of debentures, also any other moneys which may from time to time be received by the Corporation in the realization of real estate or other permanent assets."

It is argued on behalf of the respondent that this legislation is not authority for the course followed by the appellant in that the "sinking fund" referred to in para. (c) is the sinking fund in connection with the particular issue of debentures in respect of the sale of which a surplus arises, *i.e.*, in the present case, the sinking fund pertinent to the debentures here in question. It may be pointed out that the debentures here in question are apparently not sinking fund debentures at all, except in so far as any of the ratepayers, liable for the rates imposed to repay the debentures, may have commuted the rates required of them. A sinking fund has been described as something which is to provide for the payment of the debt when the debt becomes due: *Rex ex rel. Clarey v. Plant* (1923), 24 O.W.N. 6 at 7. However that may be, it is difficult to give to this paragraph the meaning contended for on behalf of the respondent, in view of the latter part of the paragraph dealing with moneys arising from the sale of real estate or other assets, which may well have no relation to any particular debenture issue whatsoever, and it is the same sinking fund to which both "the unrequired balance of any loan" and these other moneys may be transferred. The earlier paragraphs of the section deal with the sinking fund of the municipality as a whole, as well as with individual sinking

funds in connection with particular debenture debts, and it would rather appear that the sinking fund being dealt with in para. (c) is the sinking fund of the appellant as a whole.

It is true that in one sense the surplus here in question was "not required" for the work, in that the cost of the work itself was fully met apart from this surplus. However, the moneys constituting this surplus were not free moneys in the hands of the appellant, but were impressed with a trust and therefore were "required" to be accounted for to the *cestuis que trust*, whoever they might be. There are numerous instances in which the appellant municipality would, or could, have outstanding debenture issues payable entirely by the corporation at large, in connection with which unrequired balances would remain in the hands of the appellant; to such balances para. (c) would no doubt apply. In my opinion, it would require more explicit language to make applicable the provisions of this paragraph to a surplus such as that in question in this action.

In *Smith v. The Township of Raleigh* (1882), 3 O.R. 405, it was held that moneys raised by a special rate upon certain lands to be benefited by a drainage work pursuant to the drainage provisions of the then Municipal Act were trust moneys. As stated by the trial judge, Ferguson J., at p. 411: "The defendants became possessed of moneys which they were bound to expend in a certain way and no other, for the benefit and advantage of certain land owners and ratepayers, of whom the plaintiff was one." In my opinion the moneys raised by the issue of debentures, including the surplus here in question, are also trust moneys bound by a similar trust.

The question for decision in the case at bar is as to the persons who constitute the *cestuis que trust* of these surplus moneys. It is mentioned in the *Smith* case that the defendant council had been in the habit of refunding to the "ratepayers", proportionately, balances formerly remaining in its hands after the completion of works. The authority for such a practice was no doubt s. 574(1) of The Consolidated Municipal Act, 1883, 46 Vic. c. 18, providing that where a by-law which had been acted on by the construction of works in whole or in part, had provided more than sufficient means for the completion of the works or for the redemption of the debentures authorized thereunder, the council might from time to time amend the by-law

"in order fully to carry out the intention thereof and of the petition on which the same was founded." In *Dillon v. Township of Raleigh* (1886), 13 O.A.R. 53 (affirmed 14 S.C.R. 739), in the judgment of Osler J.A., at p. 64, it is stated that the by-law would be amended in such circumstances to reduce the assessment. This last-mentioned case involved an assumed surplus on completion of a drainage work which the council had refunded to the ratepayers. At p. 65, Osler J.A. says: "I think the Council and the ratepayers might very well agree to deal with the surplus fund as they have dealt with it, all parties being satisfied that the drain could be properly constructed for \$4000." The learned judge went on to say: "On the other hand, the Council were at liberty to say that it could not be known until the completion of the drain whether the by-law had provided more than sufficient means for the purpose, and therefore to retain the surplus until it could be seen that it was unnecessary from the failure of the contractors or other reasons to resort to it." He did not deal with the question as to how the surplus which might then remain would be divided.

In 1886, by 49 Vic. c. 37, s. 26, s. 574(1) of the Act of 1883 was amended by adding at the end the words "and to refund the surplus (if any) to the then owners of the land *pro rata*, according to the original assessment." This legislation was amended from time to time, and in its present form is to be found in subs. 3 of s. 69 of The Municipal Drainage Act, R.S.O. 1937, c. 278. In 1920, by 10-11 Geo. V., c. 67, s. 6, provision was made as to the person entitled to the refund in respect of any particular property where the special rate had been commuted. In such a case the owner according to the last revised assessment roll was declared entitled.

The legislation with respect to local improvement works, other than drainage schemes, has had a different history. In the Consolidated Municipal Act of 1883, local improvement works, other than drains, were provided for by ss. 612 *et seq.* Subs. 5 of s. 612 provided that if a surplus should arise from an assessment, it was to be refunded rateably "to those by whom it was paid". By s. 617 it was provided that, in order to avoid "refunding in case of over assessments", a council might raise a temporary loan until the work was completed, and then provide for the special assessment and for debentures to pay off the loan. The

section does not contemplate, expressly at any rate, a surplus arising on the sale of the debentures over and above the amount of the temporary loan. This provision is to be found in the statutes for the last time in The Consolidated Municipal Act of 1903, 3 Edw. VII, c. 19, s. 665(2). It disappeared when the statute entitled "The Local Improvement Sections of the Municipal Act" was passed in 1911 as 1 Geo. V, c. 58. S. 40(5) of the last-mentioned Act, although it provided as formerly for the case of a deficit, no longer made provision for the case of a surplus.

In my opinion, there being no statutory provision expressly applicable, the *cestuis que trust* of the fund here in question are the persons who paid the special rates to provide for the debt created by the debentures, *i.e.*, to adopt the language of s. 612(5) of the Act of 1883, "those by whom" the debenture debt will have been paid. It required special provisions, as already pointed out, to restrict the class of those entitled to the "then owners" and owners "according to the last revised assessment roll." I refer to *Re Schneider's Application; Petty and Levison v. The City of New York* (1910), 136 App. Div. (N.Y.) 444.

It does not appear how long the respondent has been the owner of the lands in respect of which he is personally interested, nor does it appear what changes of ownership there have been in the other lands liable for the special assessment throughout the twenty years during which these local improvement rates have been levied. Had there been no changes in ownership of any of these lands, it might perhaps have been proper to direct that the surplus in question in the hands of the appellant be applied *pro rata* in payment of the last annual instalment of the rate due in 1943 under by-law 9999. It is most unlikely, however, that no changes of ownership have taken place. I would substitute for the declaration contained in the judgment below a declaration that the persons who have paid the local improvements rates called for under by-law 9999 throughout the twenty years are entitled to share *pro rata* in the fund in question in this action, and direct a reference to the Master to determine the persons entitled and their respective shares. I would allow the appeal accordingly.

It is to be noted that in 1941, by 5 Geo. VI, c. 27, s. 2, subs. 9 was added to s. 49 of The Local Improvement Act. This subsec-

tion reads as follows: "If the amount realized from the debentures exceeds the amount of the cost of the work, the excess sum shall be applied *pro tanto* to payment of the rates to be levied under the by-law providing for the issue of the debentures." This subsection was not in force at the time of the sale of the debentures here in question, and cannot therefore apply to this action.

In my opinion the appellant should have its costs of the appeal. While the respondent did not succeed in any of his claims as framed, nevertheless, as the action was brought to determine the rights of the specially assessed ratepayers in the fund, and as the respondent has an interest therein, I think he should have his costs of the action and the appeal. All the costs hereby provided for should be directed to be paid out of the fund in question. This fund, although it has already been applied otherwise by the appellant, the appellant must restore. The costs of the reference will be in the discretion of the Master.

Judgment varied.

Solicitors for the plaintiff, respondent: Smith, Rae, Greer & Cartwright, Toronto.

Solicitor for the defendant, appellant: W. G. Angus, Toronto.

[ROSE C.J.H.C.]

Re Gauthier.

Conflict of Laws—Choice of Law—Wills—Disposition of Personality—Whether Mortgagee's Right to Mortgage Moneys Included—The Wills Act, R.S.O. 1937, c. 164, ss. 1(c), (d), 19(1).

Wills—Validity—British Subject Domiciled outside Ontario—Mortgage on Land within Ontario—Disposition of Mortgage Moneys as Part of Residue—Will in Form Recognized by Law of Domicile—The Wills Act, R.S.O. 1937, c. 164, s. 19(1).

Mortgages—Nature of Mortgagee's Right—Right to Receive Money—Whether Realty or Personality.

Whatever may be the position as to the security for the money, the money itself which is secured by a mortgage is personality, and within the definition of "personal estate" in s. 1(c) of The Wills Act, R.S.O. 1937, c. 164. It follows that s. 19(1) of the Act applies to mortgage moneys, and that a will made by a British subject not resident in Ontario, if it is valid according to the law of the testator's domicile, will be effective, under a disposition of residue, to pass the mortgage moneys, even if it is not executed in accordance with the law of Ontario.

A MOTION for the opinion, advice and directions of the Court. The facts are fully stated in the reasons for judgment.

1st March 1944. The motion was heard by ROSE C.J.H.C. in Weekly Court at Toronto.

S. E. Fennell, for the Ontario administrator, applicant.

C. C. Calvin, K.C., for the executrix and residuary legatee.

G. W. G. Gauld, for the next-of-kin except Josephine Jasmin and the executrix.

18th May 1944. ROSE C.J.H.C.:—Angelina Gauthier was a British subject resident and domiciled in the Province of Quebec. She left a holograph will which, as is sworn and not denied, was validly executed in Quebec in accordance with the forms required by the law of that Province. By it all her property not otherwise disposed of was left to her sister Aldina Gauthier (now Aldina Gauthier Seguin) who also was appointed executrix. One of the assets so left was a mortgage upon lands in Ontario. The mortgagors were prepared to pay off the mortgage, and in order that there might be someone authorized by the law of Ontario to receive the mortgage money, Mr. Rodolphe Danis, on instructions from the executrix and from some of the next-of-kin (others of the next-of-kin having renounced their right to letters of administration), applied to the Surrogate Court of the County of Carleton for, and was granted, letters of administration of the Ontario property. This administration was granted as of the property of an intestate on the theory that the holograph will was not effective to pass the property in the mortgage. Nevertheless, the mortgagors were content with a discharge executed by Mr. Danis (see The Mortgages Act, R.S.O. 1937, c. 155, s. 9) and the mortgage money was received by him and is now in his hands for payment to the person or persons entitled. He, by originating notice, asks (1)(a) whether the money is to be distributed according to the law of Ontario as on an intestacy, or (1)(b) whether it is to be handed to the executrix in Quebec. He asks also certain questions which need not be discussed if the answer to question (1)(b) is in the affirmative.

Obviously if the will is effective to dispose of the interest of the testatrix, difficulty is caused by the fact that the letters of administration profess to be letters of administration of the

property of an intestate; but Mr. Danis has undertaken that if the Court is of opinion that the mortgage (or, to speak more precisely, the right to the mortgage money) passed under the will, he will apply for a revocation of the grant and for the issue of letters of administration with the holograph will annexed. Therefore, it seems to be proper for the purposes of this motion to ignore the form of the grant and to proceed to answer the questions asked.

The essential difference between this case and *Re Landry and Steinhoff*, [1941] O.R. 67, [1941] 1 D.L.R. 699, is in the fact that in *Re Landry and Steinhoff* the testatrix was not a British subject, as appears clearly from the report in the Dominion Law Reports, so that s. 19(1) of The Wills Act, R.S.O. 1937, c. 164, had no application. Here, however, the testatrix, as has been stated, was a British subject, and the will, being executed in the Province of Quebec and according to the form required by the law of that Province, was effective if the testatrix's interest as mortgagee was personal estate; and the question that must be answered is whether that interest was personal estate within the meaning of the section.

"It has been long settled that a mortgage security is personal estate, since the principal right of the mortgagee is to the money, and his right to the land is only a security for the money": 23 Halsbury's Laws of England, 2nd ed., p. 351, note (g); Falconbridge, The Law of Mortgages, 3rd ed., p. 249; *Thornborough v. Baker* (1675), 3 Swan. 628, 36 E.R. 1000; *Canning v. Hicks* (1686), 1 Vern. 412, 23 E.R. 553; *Tabor v. Grover* (1699), 2 Vern. 367, 23 E.R. 831; *Re St. Amand* (1918), 15 O.W.N. 165 (cited by Greene J. in *Re Landry and Steinhoff*, *supra*); *In re Loveridge*; *Drayton v. Loveridge*, [1902] 2 Ch. 859.

Such confusion as there has been in the cases, as Dean Falconbridge points out in his note to *Re Landry and Steinhoff* in the Dominion Law Reports, is attributable to a failure sometimes to remember that the distinction between immoveables and moveables is not the same thing as the distinction between realty and personalty. The general rule is that succession to immoveables and the validity of a will of immoveables are governed by the *lex rei sitae*; a mortgage creates an interest in an immoveable; hence in *Re Landry and Steinhoff* the will, which was not executed in the form required by the Ontario statute,

was ineffective to pass it; but if a mortgage, although creating an interest in an immoveable, is personal estate, then a will to which Lord Kingsdown's Act (in Ontario s. 19 of The Wills Act) applies is effective. Lord Kingsdown's Act does apply in the case of leaseholds: *In re Grassi; Stubberfield v. Grassi*, [1905] 1 Ch. 584, and I think it applies in the case of mortgages also, although, as will appear, I do not deem it necessary in this particular case to express an opinion as to whether it applies in such sense as to render the will effective to pass all the rights of the mortgagee.

There was at one time in England doubt as to whether the expression "personal estate" as used and defined in The Wills Act was the same thing as the personal estate mentioned in Lord Kingsdown's Act (see *In re Lyne's Settlement Trusts; In re Gibbs; Lyne v. Gibbs*, [1919] 1 Ch. 80); and perhaps there was room for a similar doubt in Ontario after the introduction of the first section of Lord Kingsdown's Act by c. 18 of the statutes of 1902; but in Ontario the provision corresponding to s. 1 of Lord Kingsdown's Act is now s. 19(1) of The Wills Act, and I take it that the interpretation given to the expression in s. 1(c) of The Wills Act governs in so far as it is relevant. That interpretation of "personal estate" corresponds fairly closely with the interpretation contained in The Wills Act of 1837 (Imperial).

On the argument it was suggested that the statute by including in personal estate "securities for money (not being real estate)" excludes real estate as defined by s. 1(d); and that as real estate includes "land . . . and any estate, right, or interest (other than a chattel interest) therein", and as a mortgage creates an interest in land (which, it is argued, is not a chattel interest), a mortgage is excluded from the personal estate to which s. 19(1) (Lord Kingsdown's Act) applies. This argument gives rise to the only doubt that I have entertained as to what ought to be the decision in the present case, and upon consideration I have reached the conclusion that the doubt is not well founded.

The relevant words of s. 19(1) are: "Every will made out of Ontario by a British subject . . . shall, as regards personal estate, be held to be well executed for the purpose of being admitted to probate in Ontario, if the same was made according to

the forms required . . . by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made." There is no doubt that the money secured by a mortgage of real estate is personal estate and, as I understand the textbooks and the cases—see for instance *Thornborough v. Baker, supra*—there has been no doubt upon that point since 1675: the executor, not the heir, of a deceased mortgagee is the person to whom that mortgage money ought to be paid. The question as to the person to whom the legal estate in the mortgaged land descends, and the capacity in which that person takes it, is another question with which we are not, in this case, concerned: see, for instance, *In re Loveridge, supra*. Money is expressly mentioned in s. 1(c) of The Wills Act as included in the expression "personal estate", and it is with the money and the right to it that this case is concerned rather than with any question as to the legal estate in the mortgaged land, and I see no reason to doubt that by force of s. 19(1) the will, as regards that money, ought to be "held to be well executed for the purpose of being admitted to probate in Ontario"; and when it has been so admitted to probate in Ontario Mr. Danis, having the money in his hands, will be bound to deal with it as directed by the will, that is to say, to pay it to Aldina Gauthier Seguin as legatee and executrix. It is to be remembered that neither the land nor the mortgage nor the money is specifically mentioned in the will: the right of the legatee depends upon the effect of the gift to her of the residue, and if that gift was effective as regards the money there seems to be no reason for debating, in this particular case, the question—however interesting it may be in itself—as to its precise effect, or lack of effect, as regards the security for that money. Moreover, if what has to be considered is the mortgage itself rather than the money secured by it, my opinion is that the words of s. 1(c) of the Act create no real difficulty; the security for the money—the mortgage—did create an interest in land, but it was not in itself land or "real estate", and what are excluded from the definition of personal estate are securities for money that are real estate; and to treat the case as if what were under consideration were the legal estate in the land, rather than the mortgage itself, would be to make the statutory definition of personal estate lead to a decision that would be out

of harmony, as I think, with the course of the relevant decisions as to moneys secured by mortgage. In many cases the mortgage itself is spoken of as personal property; a modern one is *Re St. Amand, supra*; and it would be strange if at this late date it were discovered that in the course of applying Lord Kingsdown's Act it is necessary, by reason of the statutory definition of personal estate, to treat the mortgage as real estate although in so many instances it is personality.

Both parts of the first question propounded will be answered in accordance with the foregoing reasons; the second question does not require an answer. The costs of all persons represented will be paid out of the money in the hands of the administrator, those of the administrator being taxed as between solicitor and client. The formal order ought not to issue until the new letters of administration have been applied for and obtained.

One of the next of kin, Josephine Jasmin, the child of a deceased sister of the testatrix, was not served with the originating notice; but her interest is precisely the same as that of Mr. Gauld's clients, and the order may recite the fact that for the purpose of the motion she was sufficiently represented by them.

Order accordingly.

Solicitor for the applicant: Stanley E. Fennell, Cornwall.

[ROSE C.J.H.C.]

Rc Hughes.

Infants—Adoption—Effect—Changes in Legislation—Rights in 1943 of Child Adopted in 1925, under Will Made in 1898 by Testator who Died in 1899—Retroactivity—The Adoption Acts, 1921 (Ont.), c. 55, ss. 11, 12; 1927 (Ont.), c. 53; R.S.O. 1937, c. 218, s. 6—The Interpretation Act, R.S.O. 1937, c. 1, s. 14(c).

A testator, who died in 1899, provided by his will, made in 1898, that the income of a particular fund should be paid to his daughter E.M. for her life, and that on her death the corpus should go to her children, if she left any, and otherwise should be divided equally between two other children of the testator. E.M. died in 1943, having had no children of her own, but being survived by J.F., a daughter adopted in 1925. The Adoption Act, 1921, in force when J.F. was adopted, provided by s. 12 that "The word 'child' or its equivalent in any instrument shall include an adopted child unless the contrary plainly appears by the terms of the instrument." This Act was repealed in 1927, and s. 12 was never re-enacted.

Held, J.F. took no interest in the fund on E.M.'s death, but it must be divided between the estates of the other two children, both of whom had predeceased E.M. The Act of 1921 did not confer any right upon J.F., which would be saved from destruction, on the repeal of the Act, by s. 14(c) of The Interpretation Act. The Act of 1921 merely required the will to be read in a certain way, and, the Act having been repealed, the word "children" in the will should be read in the way in which it would have been read at the time of the testator's death, since the Act now in force provided that "as to persons other than the adopting parent, the adopted child shall not be deemed the child of the adopting parent."

A MOTION by the administrator (with will annexed) of the estate of Patrick Hughes, for the opinion, advice and direction of the Court.

12th April 1944. The motion was heard by ROSE C.J.H.C. in Weekly Court at Toronto.

W. S. Montgomery, K.C., for the administrator, applicant.

Arthur Kelly, for the estate of Ethelfreda Maud Pocock.

C. M. Ricketts, for Joan Fairley.

H. G. Steen, for the estates of Margaret Louise Hughes (otherwise known as Lois Hughes Miller) and Frank Smith Hughes.

J. L. McLennan, for the children of Patrick Hughes the younger.

21st June 1944. ROSE C.J.H.C.:—By a trust deed executed in 1878 land was conveyed to trustees to hold to the use of Margaret Louise Hughes wife of Patrick Hughes "during her natural life but only so long as she may be and remain the widow of the said Patrick Hughes in case she survives him and to such other uses and upon such other trusts as the said Patrick Hughes shall by any deed or by his last Will and Testament in writing

appoint and in default of such appointment to the use of the right heirs of the said Patrick Hughes forever". The land was sold and, as provided in the trust deed, the purchase money and the investments of such money are held on the same trusts as are in the trust deed expressed and declared of and concerning the land. The present trustees are The Toronto General Trusts Corporation.

By his last will, made in March 1898, Patrick Hughes, after reciting the trust deed and the power of appointment, proceeded, in clause 2, as follows: "I hereby appoint and direct my said trustees . . . to pay the interest dividends annual profits accretions and proceeds which shall from time to time after the death of my said wife, or her second marriage, arise from the use and investment of the said [fund of] Twenty thousand dollars, and I also bequeath the same as follows:—(a) Upon seven thousand dollars thereof to my daughter Ethelfreda Maud annually during her life and after her death to pay the said Seven thousand dollars to her children if she leave any children, and if she do not leave any children, to pay the interest dividends annual profits accretions and proceeds to my wife for life in the event of her second marriage, and after her death to pay and divide the said seven thousand dollars to and between my children Margaret Louise and Frank Smith equally, or to the survivor of them."

He went on in sub-clause (b) to dispose of another seven thousand dollars in favour of his daughter Margaret Louise for life, which sum, after Margaret Louise's death, was to be paid to her children, if any, and if she left no children was to be divided (after the widow's death) between the testator's children Ethelfreda Maud and Frank Smith or the survivor of them; by sub-clause (c) he disposed of five thousand dollars in favour of his son Frank Smith Hughes; in sub-clause (d) he disposed of the remaining one thousand dollars in favour of his son Bernard Hughes and his children; and in clause 2(e) he said: "In the event of the death of my children Ethelfreda Maud Margaret Louise and Frank Smith without leaving any children, at the death of each of them to give, pay and divide the life share under this will of the last survivor of them equally between my children Bernard, Patrick and Ida Mercy, or the survivor or survivors of them." By clause 3 he gave, devised and bequeathed all the rest and residue of his property to his wife Margaret Louise Hughes.

The testator died in March 1899, and letters of administration with the will annexed were granted to The Toronto General Trusts Corporation in April 1902. The testator's widow did not remarry. She died in April 1921, leaving a will of which The Toronto General Trusts Corporation is executor. Margaret Louise Hughes, known as Lois Hughes Miller, mentioned in clause 2(b) of the will died in 1941 leaving children who have received the sum disposed of by that clause. Frank Smith Hughes mentioned in clause 2(c) died in March 1933. He in his lifetime received the share disposed of by that clause. Bernard Hughes mentioned in clause 2(d) died some twenty years ago leaving no children but leaving a widow who is now deceased. The only share of the appointed fund that remains unadministered is the \$7,000 disposed of by clause 2(a).

Ethelfreda Maud Pocock mentioned in clause 2(a) died in January 1943. She left no child of her own but she and her husband had in 1925 adopted a child who is now Joan Fairley.

As to the fund of \$7,000 the trustees by their originating notice of motion ask: (a) Does it fall into the estates of Lois Hughes Miller and Frank Smith Hughes or does it fall into the estate of Margaret Louise Hughes under the residuary bequest contained in para. 3 of the will, or does it become distributable under para. 2(e)? And (b) if it becomes distributable under para. 2(e), who are the persons to take it?

The Act under which Mrs. Fairley was adopted was The Adoption Act, 1921 (Ontario Statutes of 1921 c. 55). By s. 11 of that Act a person who had been adopted under it was to take the same share of property which the adopting parent could dispose of by will as he would have taken if born to such parent in lawful wedlock, and he was to stand in regard to the legal descendants, but to no other kindred of such adopting parent, in the same position as if he had been born to him. Section 12 of the Act was in these words: "The word 'child' or its equivalent in any instrument shall include an adopted child unless the contrary plainly appears by the terms of the instrument." The Adoption Act, 1921 was wholly repealed by The Adoption Act, 1927 (Ontario Statutes of 1927, c. 53), many of its provisions with some modifications being re-enacted. Section 12 of the Act of 1921 was not re-enacted. Amongst the new provisions introduced in 1927 was s. 6(6) as follows: "Save as herein provided and as to persons other than the adopting parent, the adopted child

shall not be deemed the child of the adopting parent," which subsection is now s. 6(7) of the present Act, R.S.O. 1937, c. 218. The Act of 1927 included a provision (s. 6(2)) that an adoption order "shall confer on the adopted child upon the intestacy of the adopting parent, the same rights to and interests in the property of the adopting parent as a child born in lawful wedlock of the adopting parent, and the expressions 'child,' 'children' and 'issue' where used in any disposition made after the making of an adoption order by the adopting parent, shall, unless the contrary intention appears, include an adopted child or children or the issue of an adopted child;" and this provision has been carried forward into the Revised Statutes of 1937 (s. 6(3)). By the Act of 1927 it was declared (s. 6(4)) that for the purposes of that section "disposition" meant an assurance of any interest in property by any instrument, whether *inter vivos* or by will. S. 6(5) of the Revised Statutes of 1937 is in the same words.

The argument advanced by counsel for Mrs. Fairley is in effect that s. 12 of The Adoption Act, 1921 applied to Patrick Hughes's will; that consequently under paragraph 2(a) Mrs. Fairley acquired a vested interest in the \$7,000 fund subject to Mrs. Pocock's life estate; that the repeal of the section in 1927 did not operate retroactively upon that vested interest; and that Mrs. Fairley accordingly became entitled to the fund upon the death of Mrs. Pocock in 1943. Reference is made to The Interpretation Act, R.S.O. 1937, c. 1, s. 14(c), which enacts that where an Act is repealed the appeal shall not, save as otherwise in the section provided, affect any right acquired, accrued, or accruing under the Act repealed, and to certain authorities.

In my opinion the argument just mentioned cannot prevail. There is no doubt that at the time of the making of the will in 1898 and at the time of the testator's death in 1899, the word "children" as used by him in clause 2(a) meant children born to his daughter Ethelfreda Maud, and not children whom she might adopt: see for instance *Re Hanna*, [1937] O.W.N. 517. The effect of the clause then was, subject to the life estates of the widow and Mrs. Pocock, to give the corpus of the fund of \$7,000 to the testator's children Margaret Louise and Frank Smith or the survivor of them, unless a child or children should be born to Mrs. Pocock. Whether the interest thus given to Margaret Louise and Frank Smith is properly to be described as vested or contingent need not in this connection be decided; for

whether the interest was vested or merely contingent it was substantial, and the statute of 1921 is not to be given such a reading as will destroy such an interest, unless such a reading is, upon the wording of the statute, inevitable. In Maxwell on Statutes, 7th ed., at pp. 186 and the following, are cited many cases illustrative of the proposition that if an enactment is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only. Amongst these cases I have not found any, and none has been cited, in which the question that had to be decided was in form very like the question in the present case, but reference may be made to *Jones v. Ogle* (1872), L.R. 8 Ch. 192; *In re March*; *Mander v. Harris* (1884), 27 Ch. D. 166; *In re Bridger*; *Brompton Hospital for Consumption v. Lewis*, [1894] 1 Ch. 297; *In re Baroness Llanover*; *Herbert v. Freshfield* (2), [1903] 2 Ch. 330; *Smith v. Callander*, [1901] A.C. 297; and *West v. Gwynne*, [1911] 2 Ch. 1, this last case being one in which, upon the language of the statute, it was held that an Act which engrafted a certain proviso upon covenants against assigning or subletting without leave applied to leases current at the time of its passing. The language of s. 12 of The Adoption Act, 1921 is unqualified; it gives an interpretation to the word "child" or its equivalent in "any" instrument. Nevertheless it is contained in a statute which makes the adopted child stand to the legal descendants, but to no other kindred, of the adopting parent in the same position as if he had been born to the adopting parent, so that if Patrick Hughes had been alive at the time of the adoption Mrs. Fairley, the adopted child, would not have stood towards him in the position of a grandchild. That being so I cannot believe that in 1921 the Legislature intended so to alter the meaning of a will admitted to probate nearly twenty years before as to give to the adopted child the estate which the testator had set aside for any child who might be born to his daughter and to deprive two other children of the testator of the estate that he had decreed should go to them if no child was born to their sister. Whether the Legislature meant merely to say, as in s. 6(2) of the later Act, that the words "child", etc., when used by the adopting parent in a disposition made after the adoption order, should include an adopted child or what other limitation was intended there is no means of knowing; but I think it is inconsistent with the course of the decisions referred

to in Maxwell on Statutes to say that s. 12 had, while it remained in force, any application to the will in question. Moreover, it seems inconsistent to say that the declaration in the Act of 1927 that the adopted child shall not be deemed the child of the adopting parent is not to be read in such sense as to deprive Mrs. Fairley of a status acquired under the will as interpreted by the Act of 1921 and at the same time to say that the Act of 1921 was effective, by giving a new meaning to the will, to take away the rights that the will itself had given to two of the testator's children, and I do not believe that the authorities impose upon the Court the obligation of being guilty of such inconsistency. Also, I think it would be a stretch of s. 14(c) of The Interpretation Act to make it applicable. The effect of the Act of 1921, if it had any relevant effect, was to require a certain reading to be given to the will, not to confer a right upon Mrs. Fairley, and it is only to rights acquired, accrued or accruing under the repealed Act that The Interpretation Act applies. This seems to accord with the view expressed by Orde J.A. in *Re Skinner*, 64 O.L.R. 245 at 250, [1929] 4 D.L.R. 427, in a case in which the facts were in some respects similar to the facts of the present case.

There seems to be some confusion in clause 2(a) of the will, as written and unaffected by The Adoption Act. Patrick Hughes's power of appointment was subject to the trust created by the deed of 1878 for Mrs. Hughes for life or widowhood. What he did in the first part of clause 2 of his will was to appoint the revenue after his wife's death or second marriage, and the fund itself (assuming, as everyone has assumed, the words "the same" to mean the fund). In clause 2(a) he gives to Mrs. Pocock (of course, after the death or remarriage of her mother) the revenue of a part of that fund for life and after her death he gives the part itself to her children if she leaves any; but if she leaves no children he gives the revenue to his widow for life in the event of her second marriage (that is to say he seems to expect that the widow may remarry, and that the income will go to Mrs. Pocock, and that then Mrs. Pocock will die during the life of the widow), and then after the widow's death he gives the fund itself to his children Margaret Louise and Frank Smith equally or to the survivor of them. But the clause must if possible be read so as to be applicable in the events that have happened, and I think that, notwithstanding the confusion caused by the intro-

duction of the provision for the event of the widow's remarrying and surviving Mrs. Pocock, the fair meaning of the whole clause is that if Mrs. Pocock leaves no children the \$7,000 fund shall, subject to the interests of the widow and Mrs. Pocock, belong to Margaret Louise and Frank Smith or to the survivor of them. I think that this gift created a vested interest, and that the fund is now held in trust for the personal representatives of Margaret Louise and Frank Smith in equal shares; see *Browne v. Moody et al.*, [1936] A.C. 635, [1936] 2 All E.R. 1695, [1936] O.R. 422, [1936] 4 D.L.R. 1, [1936] 3 W.W.R. 59. I cannot see the bearing of the rule in *Cripps v. Wolcott et al.* (1819), 4 Madd. 11, 56 E.R. 613, which was much discussed by counsel. If one of the two, Margaret Louise and Frank Smith, had died before Mrs. Pocock or the widow and the other had survived her *Cripps v. Wolcott* might have had to be considered, but I fail to see how it applies in the event that has happened. Both Margaret Louise and Frank Smith were alive at the death of the widow, if that is the period to which the provision for survivorship is referable, and they were both dead at the death of Mrs. Pocock, if that is the period. On a very literal reading of clause 2(a) of the will the former would seem to be the period; but if the estates were vested, as I think they were, it is not necessary to decide whether the period was the death of the testator or the death of the widow or the death of Mrs. Pocock.

There is no need to consider clause 2(e) of the will. In the first place it is very difficult, indeed, to assign to it any intelligible meaning. It says that in the event of the death of the children Ethelfreda Maud, Margaret Louise and Frank Smith without leaving any children, the trustees at the death of *each* shall give, pay and divide the *life share* under the will of the *last survivor* of them equally between the testator's children Bernard, Patrick and Ida Mercy, (who as I understand are children of a first marriage) or the survivor or survivors of them. It says nothing about any capital sum, and how it could dispose of the "life share" of the last survivor of the three on the death of the first of the three to die it is difficult to say. Some of the counsel made suggestions about reading into it words that are not there in order to make it bear the meaning that they surmise was the meaning that the testator intended, but I cannot find any justification for the adoption of any such suggestion. In the second place clause 2(a), the meaning of which to my mind is fairly clear, provides

definitely for the disposition of "the said seven thousand dollars" and I do not see how that definite disposition of the capital is to be displaced by a disposition of the "life share" of the last survivor of the children Ethelfreda Maud, Margaret Louise and Frank Smith.

There were suggestions by counsel that in the events that had happened there was an intestacy as to the fund of \$7,000 and that the provision of the trust deed for default of appointment operated and that the fund was now held by the trustees to the use of the right heirs of Patrick Hughes, and there was an alternative suggestion that clause 3 of the will which gives all the rest and residue of the testator's property to his wife operated, and that the fund passed under the wife's will. If I am right in the opinion that I have expressed as to the meaning of clause 2(a), there was no intestacy, and there is no reason for entering upon an inquiry as to whether upon a failure of the testator to deal specifically with the fund, the gift of the residue of his property would be effective to reach the fund or whether resort would have had to be had to the trust deed.

The answer to the question propounded by the originating notice is that the fund falls into the estates of Lois Hughes Miller and Frank Smith Hughes.

The costs of all persons represented ought to be paid out of the fund, those of the trustees being taxed as between solicitor and client.

Order accordingly.

Solicitors for the trustee, applicant: Malone, Malone & Montgomery, Toronto.

Solicitors for the Executors of Lois Hughes Miller: Hughes, Agar, Thompson & Amys, Toronto.

Solicitors for Monica Patterson and others: Macdonald & Macintosh, Toronto.

[HOGG J.]

Gold-Rex Kirkland Mines Limited et al. v. Morrow et al.

Companies—Meetings—Special General Meeting for Election of Directors—Sufficiency of Requisition and Notice—The Companies Act, R.S.O. 1937, c. 251, ss. 47, 89.

Where the directors of a company, having received a requisition under s. 47 of The Companies Act, do not call a meeting as requested, and shareholders thereupon give notice of a meeting, and this notice is for some reason defective, e.g., in that it is not sent to all shareholders, or that it is sent out before the end of the prescribed time, there is nothing to prevent the shareholders from giving a fresh notice, in which the defects of the first are cured, before the meeting, adjourned on the date specified in the first notice, is actually held, and if this is done, and the second notice is in all respects valid, the meeting may validly transact the business for which it was called. Where it is proposed to hold a meeting for the purpose of electing new directors to replace the existing directors, the notice is sufficient if it merely specifies, as the business for the meeting, the election of directors, without further saying that it is proposed to remove the existing directors; these automatically cease to hold office when their successors are elected, under s. 89 of the Act. *The Austin Mining Company (Limited) v. Gammel* (1886), 10 O.R. 696, referred to.

AN action for a declaration and other relief. The facts, and the relief sought, are fully set out in the reasons for judgment.

25th and 26th May 1944. The action was tried by HOGG J. without a jury at Toronto.

D. R. Michener, for the plaintiffs.

R. I. Ferguson, K.C., for the defendants.

23rd June 1944. HOGG J.:—The plaintiffs in this action allege that at a special general meeting of the shareholders called for the purpose of electing directors of the company, held on 17th January 1944, the individual plaintiffs were elected directors, and that subsequently one J. W. C. Cornell was appointed the company's secretary-treasurer, which office was formerly held by the defendant McCreath. The individual plaintiffs further allege that the former directors, the defendants Morrow, Ferguson and McLaren, have continued, since being deposed by the shareholders at the said meeting, to act as directors of the plaintiff company, and that the defendant McCreath refuses to deliver up the books, records, securities, and other property of the company to the newly-appointed secretary-treasurer. The defendants plead that the special general meeting of shareholders of the 17th January last was invalid and did not conform to the provisions of s. 47 of The Companies Act, R.S.O. 1937, c. 251; that the purported election of directors was invalid, and that the former board of directors are still the directors of the company. The

company is a plaintiff in pursuance of the act and instructions of the individual plaintiffs purporting to act as the directors of the company, and the said individual plaintiffs ask for a declaration of the Court that they were elected directors of the plaintiff company at a meeting of shareholders thereof held on the 17th January 1944 and that the defendants Morrow, Ferguson, and McLaren are no longer directors of the company; also for an order that the books, records, other documents and papers of the company, including certain Dominion of Canada bonds, be delivered to the present secretary of the company. Certain other relief is claimed by the plaintiffs, including damages against the defendant McCreathe, who still purports to act as secretary-treasurer of the company.

The defendants, by way of counterclaim, request a declaration that the defendants Morrow and Ferguson and the plaintiffs McNabb and Johnston are the directors of the company and an order restraining the plaintiffs Cadieux, Thorpe and Davis from acting as directors.

The point in issue is a narrow one, and involves in large part the meaning and interpretation of the said s. 47 of The Companies Act.

The evidence shows that there had not been a meeting of shareholders or an election of directors of the plaintiff company since June 1938, and although there have been attempts, on the part of certain of the shareholders of the company, to have a meeting of shareholders convened, such attempts have not succeeded, owing to the fact that injunctions have been obtained in an action brought by the company itself, restraining the holding of such meetings.

S. 47, above referred to, of the statute, provides, by subs. 1, that upon the receipt of a requisition in writing, signed by the holders of not less than one-tenth of the subscribed shares of the company, setting out the objects of the proposed meeting, the directors of the company shall forthwith convene a special general meeting, and subs. 2 provides that if such meeting is not called and held within twenty-one days from the date upon which the requisition was left at the head office of the company, any shareholders holding not less than one-tenth in value of the subscribed shares of the company may themselves convene such special general meeting.

1,745,014 shares of the Gold-Rex company have been subscribed for and issued as fully paid up. One-tenth of this number of shares would be 174,502 shares. A requisition in writing, setting out the object of the proposed meeting of shareholders to be the election of directors, which I find was signed by shareholders of the company holding more than one-tenth of the number of subscribed shares of the company, and which complies with the terms of the statute, was delivered at the head office of the company on 8th December 1943. No meeting of shareholders was called by the directors, or held, within the 21 days prescribed by the statute. This time expired on 29th December 1943. The by-laws of the company require that five days' notice of a meeting of shareholders shall be given to the shareholders. A notice of a special general meeting of the company to elect directors was signed by certain shareholders of the company, and sent to the shareholders on 23rd December 1943, calling a special general meeting for 30th December 1943 for the purpose of electing directors. I find that this notice was not sent to all the shareholders of the company, due to the fact that the shareholders who sent out the notice did not have a complete list of the holders of shares in the company, and also that the notice was sent out before the twenty-one days had elapsed. This notice did not, therefore, comply with the terms of the statute.

The meeting of the 30th December was put an end to by an interim injunction which had been obtained by the defendants in the action, and which restricted any business being done except the adjournment of the meeting. This meeting was adjourned to 7th January 1944, and was further adjourned to the 17th January. The injunction restraining the holding of the meeting was dissolved on the 6th January.

Some doubt was present in the minds of the shareholders who were endeavouring to have a meeting of the shareholders of the company as to the validity of the notice which they had sent out calling a meeting for the 30th December, and in order to make certain that the meeting to elect directors should be properly called they sent out a second notice for a meeting of shareholders for 17th January 1944. It is admitted by counsel for the defendants that this notice was a proper one and was sent to all the shareholders of the company, and I find that this is a fact. The meeting was held on the 17th January and the plaintiffs Johnston, McNabb, Cadieux, Thorpe and Davis were elected as the new directors of the plaintiff company.

The defendants contend that the notice sent out on the 23rd December, for a meeting to be held on the 30th December, exhausted any powers which the shareholders had under the requisition, which they had obtained as provided by s. 47 of the Act, to call a further meeting, and that, having called a meeting in the first instance for the 17th January by a notice which was invalid, no power remained in the shareholders to send out the second notice on the 7th January for the meeting of the same date, namely, the 17th January. In other words, the defendants argue that a new requisition under s. 47, subs. 1, would be necessary before a second notice of meeting could be sent out. I am not able to hold with this contention.

The language of a statute must be construed in its ordinary and literal sense. There is no magic in the requisition required by s. 47 of the Act which vanishes because those who have invoked the provisions of the section take steps to correct certain acts they have done purporting to be in pursuance of the section, which do not properly carry out its terms, in order that such terms may be properly complied with. My opinion is that the statute means that the shareholders are entitled to convene a valid meeting, and one at which the purposes for which it is called can be accomplished.

The defendants also contended that the meeting must be called, not only for the purpose of electing directors, but also for the purpose of removing those who were then directors of the company, and that the notice of the meeting must disclose that the meeting is to depose and remove the present directors, as well as to fill the vacancies left after they are deposed. S. 89 of The Companies Act would seem to dispose of this argument. This section provides that if an election of directors is not made, or does not take effect at the proper time, the company shall not thereby be dissolved, but the election may take place at any general meeting of the company duly called for that purpose, and the directors shall continue in office until their successors are duly elected. Under this section there is no question of the directors having to be deposed from their office, but when their successors are duly elected their term of office expires. A section of The Companies Act in force at the time, and similar in effect to the present s. 89, is referred to in *The Austin Mining Company (Limited) v. Gemmel* (1886), 10 O.R. 696.

The defendant Morrow admits in the statement of defence that he holds 100,000 shares of the company in trust, but I am not able, on the evidence submitted, to grant the plaintiffs a declaration that this defendant holds the said shares as trustee on the trusts alleged by the plaintiffs, or to grant the other relief claimed against this defendant with respect to these shares, and this claim is dismissed.

The plaintiffs are entitled to a declaration that the individual plaintiffs were validly elected directors of the plaintiff company, also to an order that the defendant, B. H. McCreath, the former secretary of the company, hand over the charter, minute books and other books, documents and records of the company to the present secretary of the company, Mr. J. W. C. Cornell, and the defendants, Morrow, Ferguson and McLaren are restrained from acting as directors of the company, and the defendant McCreath is restrained from acting as secretary-treasurer or as an officer of the company.

There is not sufficient evidence before me to deal with the claim that the defendant McCreath be ordered to deliver up \$8,000 of Dominion of Canada bonds alleged to be the property of the company. This defendant states that he has not the bonds and that they were disposed of in settlement of certain obligations of the company. The claim for an order that the defendant McCreath deliver up the said \$8,000 of Dominion of Canada bonds is dismissed, but I am merely adjudicating upon the plaintiff's claim for an order for the delivery up of the bonds and not as to the right, title or interest of any person, company or corporation in, or to, these bonds.

The company has not conducted any business for a number of years, and the evidence does not show any damage that it has suffered by any act of the defendant McCreath as secretary-treasurer of the company. This claim for damages is dismissed. The counterclaim is dismissed with costs. I do not think the plaintiffs are entitled to the costs of the action as they have succeeded with respect to only some of the claims made by them.

Judgment accordingly.

*Solicitors for the plaintiffs: Lang, Michener & Ricketts,
Toronto.*

*Solicitors for the defendants: Slaght, Ferguson & Carrick,
Toronto.*

[HOGG J.]

Re Swick.

Mortgages—Merger—Effect of Quit Claim Deed from Mortgagor to Mortgagee, and Consideration therefor Given by Mortgagee—Devise of Mortgage—Ademption.

Wills—Legacies—Ademption—Mortgagee Making Will, Giving Mortgage to Mortgagor—Public Trustee, as Statutory Committee of Mortgagee, Taking Quit Claim Deed and Giving Consideration therefor—Merger—Powers of Public Trustee—The Mental Hospitals Act, R.S.O. 1937, c. 392, s. 80.

The question whether or not a mortgage is merged in the legal estate by conveyance of the equity of redemption is a difficult one, and depends upon whether or not any expression of intention can be discovered. The general rule, as laid down in *Tyrwhitt v. Tyrwhitt* (1863), 32 Beav. 244 at 249, is that *prima facie* the charge merges in the inheritance, but this presumption may be rebutted if it is shown that the owner of the charge intended that it should not merge. This intention may be definitely expressed, shown by acts which are consistent only with the continued existence of the charge, or implied from circumstances making it in the interests of the owner of the charge that it should not merge.

A mortgagee made a will, in which he gave the mortgage to one of the mortgagors. He was later admitted as a patient to a mental hospital, and the Public Trustee took over the management of his affairs as statutory committee. The Public Trustee took foreclosure proceedings, and the mortgagors gave him a quit claim deed, which he accepted in the name of the mortgagee, paying \$25 as consideration therefor.

Held, in these circumstances, no intention to the contrary could be found, and the mortgage must be held to have merged. The legacy had therefore been adeemed, the legatee took nothing, and the lands in question must be dealt with under the residuary clause in the will. The acts and intentions of the Public Trustee must be considered as the acts and intentions of the mortgagee himself. *Re Richmond*, [1939] O.W.N. 101, referred to.

A MOTION for the opinion, advice and direction of the Court. The facts, and the question propounded, are fully set out in the reasons for judgment.

17th May 1944. The motion was heard by HOGG J. in Weekly Court at Toronto.

M. A. Seymour, K.C., for the executor and trustee.

F. J. Flynn and J. Bradford, for residuary legatees.

Fraser Raney, K.C., for execution creditors of the mortgagors.

27th June 1944. HOGG J.:—This is an application made by the executor and trustee of the last will and testament of Horace Swick, deceased, who died on the 27th April 1938. Probate of his will was granted on the 20th October 1938, to John Nickle Davies, his executor and trustee.

The late Horace Swick held a mortgage from Sarah Lillian Swick and Edgar Swick, her husband, a brother of the testator, upon certain lands in the county of Lincoln, the mortgage being

dated the 6th February 1925, to secure the sum of \$2,000, repayable in three years with interest. By his will, dated the 4th March 1932, the said Horace Swick devised the said mortgage to his sister-in-law Sarah Lillian Swick, one of the mortgagors.

On the 1st April 1933, Horace Swick was admitted as a mentally ill person to the Ontario Hospital at Hamilton, and thereupon his property and affairs were taken over and administered by the Public Trustee as statutory committee pursuant to the provisions of The Mental Hospitals Act, R.S.O. 1937, c. 392.

It appears that, the mortgage being in arrear, the Public Trustee commenced action on the 4th October 1934, in the name of the mortgagee Horace Swick, for foreclosure and for payment of the amount due on the mortgage. It also appears that subsequently a quit claim deed dated the 1st April 1935, in favour of Horace Swick, on the lands covered by the mortgage, was executed by the mortgagors. This conveyance is not submitted in evidence, but the executor and trustee of the will of Horace Swick deposes that the consideration set out in the deed, passing from the grantee to the grantors, was the sum of \$25, and that this amount was paid by the Public Trustee to the said Sarah and Edgar Swick. There was no release in the quit claim deed of the liability of the grantors on the covenant in the mortgage, and this conveyance was not executed by Horace Swick or by the Public Trustee on his behalf.

On the 28th July 1937, the executors of the will of one Darwin Lounsbury signed judgment in the sum of \$903.73 and costs against the said Sarah Swick and her husband, and issued executions against them, which are now in the hands of the Sheriff of the county of Lincoln. The executor of the will of Horace Swick has been advised by the execution creditors that in their opinion the executions in question bind the lands which were the subject of the mortgage aforesaid, on the ground that these lands because of the said will became the property of Sarah Swick. The executor states also that he has been advised on behalf of the residuary beneficiaries under the will that they claim to be entitled to the proceeds of the sale of the said lands in accordance with the provisions of the said will.

The executor asks the advice of the Court and submits thereto the following questions:

"Is the mortgagor, the said Sarah Lillian Swick, to whom the said mortgage was given by the said last will and testament of Horace Swick, entitled to a conveyance of the lands covered by the mortgage, or has the legacy been adeemed so that it is now the duty of the Executor and Trustee to dispose of the said lands under the residuary clause?"

It is contended on behalf of the residuary legatee that the mortgage in question was merged in the mortgaged estate as a result of the conveyance of the mortgaged lands by the mortgagors to the Public Trustee, and that therefore the specific legacy of the mortgage to Sarah Swick was adeemed, and the mortgaged lands as a consequence form part of the residue of Horace Swick's estate and should be disposed of under the terms of the will to the residuary legatees.

It was argued by counsel for the execution creditors of Sarah and Edgar Swick that there was not a merger and that the mortgage still subsists and is the property of Sarah Swick under the terms of the will.

The question whether or not a mortgage is merged in the mortgaged estate by conveyance of the equity of redemption is one of considerable difficulty and depends upon whether an expression of intention can be discovered from the circumstances.

The rule with reference to the subject under discussion is dealt with in Falconbridge, Law of Mortgages, 3rd ed., p. 369, where the author refers to the judgment of Romilly M.R. in *Tyrwhitt v. Tyrwhitt* (1863), 32 Beav. 244, at 249, 55 E.R. 96. That learned judge expressed the rule to be that *prima facie* the charge merges in the inheritance, but this presumption may be rebutted if it is shown that the intention of the owner of the charge was that it should not merge. Such intention may be definitely expressed by the mortgagee, or may be shown if the acts done are only consistent with the charge being kept alive, and may also be shown if it is in the interests of the owner of the charge that it should not merge in the inheritance. In *Thorne v. Cann*, [1895] A.C. 11, in the House of Lords, where the owner of an equity of redemption, who was not personally liable to pay, paid off a mortgagee and took an assignment of the mortgage in which there was no release of the mortgage debt but the debt was assigned, it was held that the documents showed an intention to keep alive the security, and the mortgage

was not extinguished but inured to the benefit of the owner of the equity of redemption. See the judgment of Lord Macnaghten at p. 18.

In *The North of Scotland Mortgage Company v. German* (1880), 31 U.C.C.P. 349, in a dissenting judgment, Galt J. concurred in the judgment of Mowat V.C. in *Finlayson v. Mills* (1865), 11 Gr. 218, that where there is no evidence of an expressed intention either way and no other encumbrance on the property, and it is therefore a matter of indifference to the owner whether the charge subsists or not, a merger takes place. Galt J. states that his opinion is "that when the plaintiffs accepted a conveyance from the defendant without making any reference to or mention of the mortgage debt, they thereby discharged the defendant and the charge became merged."

In the present instance there was no release in the conveyance by quit claim deed from the mortgagors to the Public Trustee representing the mortgagee, but there was the payment by him of a consideration amounting to \$25 to the mortgagors, and subsequently the payment of a small sum as rent for the lands by the mortgagors to the Public Trustee. The payment by the mortgagee of any sum as consideration for the equity in the mortgaged lands would seem to indicate that there was not an intention to keep alive the debt created by the mortgage.

The Public Trustee, under The Mental Hospitals Act, s. 80, may exercise all such rights and powers, with regard to the estate with reference to which he is committee, as the mentally ill person would have if of full age and of sound and disposing mind; see *Re Richmond*, [1939] O.W.N. 101. The Public Trustee stood in the place and stead of the mortgagee himself, and I think that, he having accepted a reconveyance of the mortgaged lands, and having paid a sum, apparently in full consideration therefor, the presumption must prevail. Under s. 80 of the statute, any intention on the part of the Public Trustee, if shown, would have to be held to be the intention of the mortgagee himself. I have concluded that there was a merger and that therefore the specific legacy of the mortgage was adeemed. Where, after making a will, a testator disposes of the subject matter of any specific legacy, that legacy is adeemed and the legatee takes nothing. This principle has been held to apply to a sale by the committee of one who is of unsound mind. There will be found a discussion of the principle in the case of *Re Richmond* above referred to.

The answer to the question propounded to the Court is that the legacy has been deemed and the lands in question are to be dealt with in accordance with the residuary clause of the said will. Costs of the application to be costs to the parties out of the estate, with costs to the executor as between solicitor and client.

Order accordingly.

Solicitors for the executor and trustee, applicant: Seymour & Lampard, St. Catharines.

[BARLOW J.]

The Huron & Erie Mortgage Corporation v. Longo.

Mortgages—Remedies of Mortgagee—Cumulative Remedies—Exercise of Power of Sale after Obtaining Judgment on Covenant to Pay.

Where a mortgagee obtains judgment on the mortgagor's covenant to pay, and issues execution thereon, there is nothing to prevent him from selling the mortgaged property under the power of sale in the mortgage, and crediting the purchase money on the judgment and execution. The execution, in such circumstances, will remain good for the deficiency, since the cause of action on the covenant becomes merged in the judgment, and can be extinguished only if the judgment itself is extinguished. *Reid v. Batty et al.*, [1933] O.W.N. 496, 817; *Gordon Grant and Company Limited v. Boos*, [1926] A.C. 781, applied. No question of the mortgagor's right to redeem can arise, as it would do if a claim for foreclosure were added to the claim for personal judgment on the covenant.

A MOTION by the defendant to set aside a writ of execution. The facts are fully stated in the reasons for judgment.

21st June 1944. The motion was heard by BARLOW J. in Weekly Court at Toronto.

R. S. Joy, for the defendant, applicant.

W. S. Sewell, for the plaintiff, *contra*.

29th June 1944. BARLOW J.:—An application by the defendant for an order setting aside the writ of execution issued in this action to the Sheriff of the County of York.

On the 13th June 1938, the plaintiff, as mortgagee, obtained judgment on the covenant in a certain mortgage in which the defendant was the covenantor for \$23,088.71, and costs. The plaintiff issued a writ of execution on the said judgment and lodged the same with the Sheriff of the County of York, which writ of execution has been duly renewed and is the writ of execution which the defendant now seeks to set aside.

Subsequent to the obtaining of the judgment and the placing of the writ of execution in the sheriff's hands, the plaintiff sold the mortgaged properties under power of sale in the mortgages and has given credit on the judgment and on the writ of execution for the amount realized, namely, \$18,852.72, thus reducing the claim on the writ of execution by this amount. The purchase money realized by the plaintiff on the sale under power of sale in the mortgage not being sufficient to satisfy the plaintiff's claim on the covenant, the difference between the amount received and the amount of the judgment represents what is commonly known as the deficiency.

The law is well settled that where a mortgagee sells under power of sale in his mortgage, and does not realize sufficient to satisfy the mortgage debt, he is entitled to sue on the covenant in the mortgage for the deficiency. Counsel for the defendant readily admits this statement of the law, but contends that judgment on the covenant having been obtained before the sale under power of sale in the mortgage, the plaintiff is not entitled to give credit on this judgment and maintain his writ of execution for the balance (deficiency). I cannot agree with him. I am of the opinion that it makes no difference whether a judgment is first obtained on the covenant and the power of sale in the mortgage is then exercised, or whether the power of sale in the mortgage is first exercised and then an action is brought on the covenant for the deficiency. It must be remembered that there is a distinction between an action by the mortgagee on the covenant alone and an action by the mortgagee for foreclosure and on the covenant. Where a foreclosure action is joined with an action on the covenant the mortgagor obtains certain rights of redemption between the time of obtaining a judgment *nisi* and the time of obtaining a final order of foreclosure. Once a final order of foreclosure is obtained the mortgagee becomes the owner of the property, and if he then seeks to enforce payment on the covenant he can do so only if he is in a position to reconvey. That position, however, does not arise in the case at bar. No foreclosure proceedings were taken.

In the case at bar the plaintiff's cause of action on the covenant became merged in the judgment and this judgment can only be extinguished if the debt is extinguished: *Reid v. Batty et al.*, [1933] O.W.N. 496, affirmed 817.

Where a mortgagee obtains a judgment on a mortgage for a sale under the direction of the Court and also judgment on the covenant, and where the purchase money is not sufficient to pay the amount found due to the mortgagee, the plaintiff gives credit for the amount of the purchase price and proceeds to realize the balance unsatisfied on the judgment on the covenant. See Falconbridge, Law of Mortgages, 3rd ed., p. 485. This is precisely the position that we have here, except that in place of a sale under the direction of the Court the sale took place under power of sale in the mortgage. See further the following quotation from the judgment in *Gordon Grant and Company, Limited v. Boos*, [1926] A.C. 781 at 786:—

“But, if the mortgagee does not use the remedy of foreclosure but sells under a power of sale given to him by the mortgage deed and brings into account the whole sum thus received and then proceeds to sue his debtor for the balance and the balance only, there is no question of double payment, and there would seem to be no reason in principle why he should not recover the balance.

“When he has foreclosed the estate, no one can tell what it is really worth; and it is for this reason that he is precluded from suing at law, because it cannot be ascertained that there is any residue due to him. The estate which he has taken under his foreclosure may be equal in value to or even greater in value than his debt. But when he sells, if he receives more than his debt, he pays the balance to the mortgagor; if he has just received the value of his debt, he cries quits. Why, then, should he not, if he has received less than the value of his debt, pursue his other remedies for the balance?

“This conclusion, which seems sound, is stated by Fisher in his Law of Mortgages (section 1969) and by Halsbury in the Laws of England (vol. 21, pp. 271 and 308), and is supported by the authority of the case of *Rudge v. Richens* (1873), L.R. 8 C.P. 358, and must be taken to be established.

“Now, if instead of the mortgagee exercising a power of sale given to him in the deed, he, when he brings an action to enforce his security, asks the Court for a sale instead of a foreclosure, why should not the same principle apply? The sale ascertains the value of the property, the mortgagee gets no more from the property than what the sale brings to him. If the

property realizes more than what is due to him, the mortgagor gets the balance. If the property realizes less, the mortgagee is pro tanto unpaid and should be allowed to sue on the personal covenant."

See also the following quotation from Falconbridge, *op. cit.*, p. 687:—

"A mortgagee who has brought an action to recover the mortgage money and for possession of the mortgaged land may also exercise the power of sale. There is nothing inconsistent in the two proceedings. Possession will be needed in the event of a sale being made. The amount realized from the sale must be applied towards payment of the mortgage debt. If enough is realized from the sale, the claim upon the covenant to pay will be satisfied; if the proceeds of the sale are insufficient, the personal judgment for the unsatisfied amount will be needed."

See *Shields v. Shields* (1918), 43 O.L.R. 111, 44 D.L.R. 763.

No question of the right of redemption arises in the case at bar. This could only arise where the mortgagee proceeds by way of foreclosure proceedings. The cases of *Kinnaird v. Trollope* (1888), 39 Ch. D. 636; *Palmer v. Hendrie* (1859), 27 Beav. 349, 54 E.R. 136; *Hancock v. W. H. Bagshaw Ltd. et al.*, [1936] O.W.N. 336; *Chatfield v. Cunningham et al.* (1891), 23 O.R. 153; and *Dowker et al. v. Thomson*, [1941] O.R. 44, [1941] 2 D.L.R. 141, cited by counsel for the defendant, do not, in my opinion, apply. They all have to do with the right of redemption in a foreclosure action, and are, therefore, not helpful in the case at bar.

Counsel for the defendant contends that in the present circumstances there is no opportunity to obtain an accounting from the mortgagee of the amounts for which credit has been given on the judgment. I cannot agree with him. A mortgagor is always entitled to an accounting. In my opinion the present application to set aside the writ of execution, or for such other order as may seem just, is sufficiently wide to enable me to make an order for the taking of the accounts by the Master for the purpose of ascertaining the deficiency after having given credit for the amount received by way of purchase money from the sale of the mortgaged properties under power of sale. Such order may go if the defendant wishes it.

For the above reasons the application will be dismissed with costs.

Motion dismissed with costs.

Solicitors for the plaintiff: Salter, Stapells, Sewell & Reilly, Toronto.

Solicitors for the defendant: Taylor & Joy, Toronto.

[COURT OF APPEAL.]

Rex v. Vanek.

Criminal Law—Appeals from Summary Convictions—Right of Prosecutor to Appeal, if Dissatisfied with Sentence—Meaning of “Conviction”—The Criminal Code, R.S.C. 1927, c. 36, s. 749.

S. 749 of The Criminal Code, providing for an appeal by “any person who thinks himself aggrieved” by a conviction is sufficiently wide to permit an informant to appeal, after a conviction, in respect of the sentence imposed. The word “conviction” is an equivocal one, being used in several senses in the Code itself, but other provisions indicate that it is used in s. 749 as including both the adjudication of guilt and the penalty imposed. *McLellan v. McKinnon* (1882), 1 O.R. 219; *Burgess v. Boetefeur and Brown* (1844), 13 L.J.M.C. 122 at 126, considered.

A MOTION, under Order in Council P.C. 4600/1943 ([1943] 2 C.W.O.R. 581), for leave to appeal from the judgment of Klein Co. Ct. J., of the County Court of the County of York, [1944] O.W.N. 300, 81 C.C.C. 330, whereby he dismissed the informant’s appeal in respect of the sentence imposed by a magistrate on convicting the accused of an offence against Wartime Regulations, on the ground that there was no right of appeal against sentence only.

20th June 1944. The motion was heard by ROBERTSON C.J.O. and GILLANDERS and KELLOCK JJ.A.

J. C. McRuer, K.C., for the informant, appellant: The term “conviction”, as used in Part XV of The Criminal Code, R.S.C. 1927, c. 36, includes both the determination of guilt and the imposition of sentence. It is similar to the formal judgment in a civil action, rather than the reasons for judgment. We are here seeking to appeal against the conviction, in this sense. I refer to ss. 726, 727, 735, 739, 741, 751, 754, and Forms 31-36. The cases bear out this interpretation: *Rex v. Morrell* (1934), 7 M.P.R. 312, 61 C.C.C. 247; *Harris v. Cooke* (1918), 88 L.J.K.B. 253 at 255; *Rex v. Rabjohns* (1913), 82 L.J.K.B. 994 at 996.

There is a line of cases, in connection with the special plea of *autrefois convict*, holding that it is the judgment of the Court, and not merely the finding of guilty, that governs. [ROBERTSON C.J.O.: Suppose a man is found guilty, and sentence is suspended. Could he not then plead *autrefois convict?*] Yes, because a suspension of sentence is a judgment.

I refer further to *Rex v. Fraser*, 81 C.C.C. 114, [1944] 2 D.L.R. 461; *Rex v. Langlois* (1911), 13 Que. P.R. 165, 20 C.C.C. 183.

J. J. Robinette, for the accused, respondent: Leave to appeal should not be granted under Order in Council P.C. 4600/1943. The recitals of the Order in Council clearly show that it is intended to apply to questions "relating to the validity and the construction of wartime regulations". No such question arises here; we are concerned solely with the interpretation of The Criminal Code, and the appeal is merely to increase the sentence, which is not an important question of law or mixed fact and law: *Rex v. Disano*, [1944] O.W.N. 404, 81 C.C.C. 272.

Under s. 749, the right of appeal exists only from (a) a conviction, (b) an order, or (c) a dismissal. This is obviously not a dismissal, and the question is whether the appeal is against a conviction or an order. It is not an appeal against a conviction, because the notice of appeal was not so headed. The heading of the notice is "Notice of Appeal against Sentence", and the body refers to "a certain Order bearing date", etc. Nowhere in the notice does the informant purport to appeal against the conviction.

There is no right of appeal unless the statute clearly confers it. The adjudication of guilt and the penalty are two distinct things, and s. 749 does not give a right of appeal against sentence alone: *McLellan v. McKinnon* (1882), 1 O.R. 219. Ss. 1012 *et seq.* make a clear distinction between appeals from conviction and appeals from sentence.

S. 735 in effect makes the costs part of a conviction. There is no similar section (other than the Forms) which makes the sentence part of the conviction. The right of appeal is from the adjudication of guilt, not from the formal document.

This is clearly not an appeal from an "order". S. 706 makes it clear that there is a distinction between an order and a conviction. This is also shown by s. 726 and the Forms, and by a comparison of ss. 727 and 731. See also *Reg. v. Sanderson*

(1886), 12 O.R. 178; *Rex v. Hartfeil*, 16 Alta. L.R. 19, [1920] 3 W.W.R. 1051, 35 C.C.C. 110 at 126, 55 D.L.R. 524. In *Rex v. Fraser*, *supra*, the question of the right of appeal was apparently not raised.

There are cases in Quebec and the western Provinces where it has been held that where an accused appeals from his conviction, the appellate court may review the sentence. But the right applies only where there is an appeal from conviction. An accused cannot appeal from sentence only: *Rex v. Auerbach* (1919), 31 C.C.C. 46, 45 D.L.R. 338; *Rex v. Herron*, 15 Sask. L.R. 297, [1922] 1 W.W.R. 838, 36 C.C.C. 398, 63 D.L.R. 163; *Rex v. Baird* (1908), 8 W.L.R. 65, 13 C.C.C. 240.

J. C. McRuer, K.C., in reply: The enacting clauses of P.C. 4600/1943 are the important ones, and they are very broad. *McLellan v. McKinnon*, *supra*, is discussed in *Rex v. Morrell*, *supra*, and the judgment of Armour J. is qualified.

The form of the notice of appeal is unimportant, provided the other side is fully informed as to what is appealed against: *Rex v. LeBlanc*, 54 N.B.R. 50, 49 C.C.C. 136, [1928] 1 D.L.R. 539. We gave full particulars. I rely particularly on *Harris v. Cooke*, *supra*.

The history of the opening words of s. 749 is given in an annotation following *Rex v. Hatt* (1915), 25 C.C.C. 263 at 268, 27 D.L.R. 640. See also *Rex ex rel. Danby v. Prince Albert Mineral Water Company*, 15 Sask. L.R. 332, [1922] 1 W.W.R. 945, 38 C.C.C. 47.

Cur. adv. vult.

5th July 1944. ROBERTSON C.J.O.:—This is a motion for leave to appeal from the judgment of Judge Klein, of the County Court of the County of York, by which he dismissed the appeal of the complainant from the judgment of a police magistrate at Toronto, by which judgment, upon finding the respondent guilty on a charge of a breach of the Wartime Regulations, the respondent was ordered to pay a fine of \$150. The ground of appeal against the magistrate's judgment was that the punishment imposed was not adequate, having regard to the gravity of the offence. It was objected for the respondent, when the appeal came on before the County Judge to be heard, that the appellant had no right of appeal against sentence only. To this

objection the County Judge gave effect, and, without hearing the appeal on the merits, he dismissed it on the short ground that the appeal did not lie.

I have had the advantage of reading the reasons for judgment of Kellock J.A., and I agree in the result reached by him, but desire to make some observations.

The procedure to be followed in such a prosecution as this is that provided by Part XV of The Criminal Code, R.S.C. 1927, c. 36, and any right of appeal from the magistrate is that provided in that Part. S. 749 reads as follows:

"Unless it is otherwise provided in any Act under which a conviction takes place or an order is made by a justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant, may appeal," and the section proceeds to say that in the Province of Ontario the appeal is to the County Court of the district or county or group of counties where the cause of the information or complaint arose. The statute gives no further appeal, and if this were a proceeding in respect of an offence under the Code, any remedy, in case the County Judge refused to entertain the appeal to him, would probably be by way of *mandamus*: *Rex v. Trottier* (1913), 6 Alta. L.R. 451, 5 W.W.R. 263, 25 W.L.R. 663, 22 C.C.C. 102, 14 D.L.R. 355; *Danielson v. Thordarson et al.*, 39 Man. R. 182, [1930] 3 W.W.R. 104, [1931] 1 D.L.R. 199. In the case of a prosecution for breach of the Wartime Regulations, however, it is provided by Order in Council P.C. 4600/1943 ([1943] 2 C.W.O.R. 581) that an appeal shall lie to the Court of Appeal, by leave of that Court, from a judgment of the County or District Court Judge, on any ground of appeal which involves a question of law or of mixed law and fact. The motion before us is for leave to appeal from the judgment of the County Court Judge dismissing the appeal to him on the ground that the appellant had no right to make that appeal. In his opinion, s. 749 gave no right of appeal in respect of the sentence imposed by the magistrate.

On the motion for leave to appeal before us, counsel for the respondent again took the objection that the statute gives no right of appeal to the County Judge on the matter of sentence, and, therefore, there can be no appeal to this Court from his judgment dismissing the appeal on that ground. That, however,

is a question to be argued and determined on the appeal for which leave is asked. Counsel for the appellant says that he has the right to have his appeal heard by the County Judge on the merits, both as to the law and as to the facts, and that broad right he has not anywhere else, an appeal to this Court being limited, as already stated, in the nature of the grounds of appeal that may be taken.

This right to be heard by the County Judge, that the appellant claims, is a substantive right, not to be confused with the right to relief which the appellant may or may not be entitled to, a matter that can only be determined when the County Judge has heard the appeal to him.

This disputed claim to be heard, which has been denied the appellant, clearly involves a question of law. It is as a question of law that the County Judge decided it. Of its importance I think there can be no doubt, for the question is the broad one whether, in proceedings under Part XV of The Criminal Code, an appeal against sentence may be taken by either party, the prosecutor or complainant, as well as the defendant. In my opinion, it is a case where leave to appeal should be granted.

We shall not, on this appeal, be able to consider whether or not the appellant has good grounds for complaining of the sentence imposed by the magistrate. That must await the hearing before the County Judge. The sole question on the appeal for which leave is granted, will be the right of the appellant to have the appeal to the County Judge, in respect of sentence, heard on its merits.

It was deemed convenient, without delaying to decide the motion for leave to appeal, to allow counsel to proceed forthwith to argue the merits of the appeal itself, for which leave was asked, in order that we should be able, without further attendance of counsel, to dispose of the appeal as well, in the event that we considered it was a case where leave to appeal should be given. I, therefore, proceed to discuss the appeal.

The question is whether the County Judge was right in deciding that the right given by s. 749 of the Code, to appeal from a "conviction", does not include the right to appeal from the sentence imposed. It is only in respect of the sentence that the appellant complains. In the case of a person convicted on indictment, in respect of which the right of appeal is given by s. 1013, an appeal against "conviction" and an appeal against "sentence"

are provided for separately by subss. 1 and 2. This suggests the obvious argument that in The Criminal Code the word "conviction" is not used in a sense that includes the "sentence" imposed upon a convicted person. That simple way of disposing of the question is, however, not left open. In Part XV of the Code the word "conviction" is used more than once to include the sentence imposed, *e.g.*, s. 739, s. 751. The word "conviction" is also used in this Part of the Code as meaning the record of the conviction, as in s. 757.

The word "conviction" is, in truth, equivocal. In *Burgess v. Boetefeur and Brown* (1844), 13 L.J.M.C. 122, at 126, 135 E.R. 193, Tindal C.J. said: "In common parlance no doubt it is taken to mean, the verdict at the time of trial, but in strict legal sense it is used to denote the judgment of the Court." This dictum is cited in *Rex v. Ireland*, [1910] 1 K.B. 654 at p. 659, where the opinion is expressed that the words "convicted" and "conviction" are of no very precise meaning. Reference may also be made to Paley on Summary Convictions, 9th ed., at p. 534. Among the cases there cited is *Rex v. Harris* (1797), 7 T.R. 238, 101 E.R. 952, where a conviction that did not state an adjudication was quashed. Lord Kenyon said in that case "A conviction is in the nature of a verdict and judgment, and therefore it must be precise and certain. And notwithstanding some old cases in Salkeld and in other books to the contrary, I take it that the judgment is an essential point in every conviction, let the punishment be fixed or not."

In *McLellan v. McKinnon* (1882), 1 O.R. 219, the late Chief Justice Armour (then Armour J.) said "The record of conviction may be said generally to consist of two adjudications, the one the adjudication of guilt, or conviction properly so called; and the other the adjudication of punishment, or sentence properly so called." He was of opinion in that case that the statute there in question, that gave a person who thought himself aggrieved by a conviction a right of appeal, did not give a right of appeal from the sentence alone. He arrived at that opinion by a consideration of the terms of the statute in question, which he thought indicated that the word "conviction" was used in its narrower sense.

The same process should, I think, be adopted here. As I have already said, the word "conviction" is used in The Criminal Code, and even in this Part of it, in both senses. I think, however,

that s. 754, which deals with the disposition of the appeal by the County Judge, is in such terms that it warrants the conclusion that an appeal may be made where the sentence is the matter complained of. This view is supported by the decisions in *Rex v. Miller* (1913), 25 W.L.R. 296, 25 C.C.C. 151 and *Rex v. Glover* (1930), 37 O.W.N. 501, 53 C.C.C. 222. S. 752 is also important. A conviction may be quashed in part: *In re Henderson*; *In re Stewart*; *In re Broder*; *In re Joe Go Get*, [1930] S.C.R. 45 at 55, 52 C.C.C. 95, [1930] 1 D.L.R. 420. S. 727 is also important, and in that connection I refer to *Reg. v. Hartley* (1890), 20 O.R. 481 at 485.

It may be that to be strictly correct the notice of motion should have spoken of an appeal from conviction, rather than an appeal from sentence, but I think in substance the notice was sufficient, as it informed the respondent accurately of the matter to be raised, and effect should not, in that case, be given to an objection that is purely technical.

I agree that the appeal should be allowed, and the matter should be referred back to the County Court Judge to be heard on the merits.

GILLANDERS J.A. agrees with KELLOCK J.A.

KELLOCK J.A.:—This is a motion for leave to appeal from a judgment of the County Court of the County of York (His Honour Judge Klein), dated the 17th April 1944, dismissing an appeal brought by the appellant against an order dated the 6th January 1944, made by one of the magistrates for the County of York, finding the respondent guilty of an offence under Order in Council P.C. 8528, in connection with the keeping of books with respect to certain transactions in sugar, and imposing a fine of \$150.

The notice of appeal to the County Court is headed "Notice of Appeal against Sentence", and the notice contains the following paragraph:

"The grounds of appeal are that the sentence does not impose adequate punishment having regard to the gravity of the offence."

The learned County Court Judge, on the appeal coming on for hearing before him, gave effect to a preliminary objection raised by counsel for the respondent, that there was no right of appeal as against sentence under the provisions of s. 749 of The Criminal Code.

The present application for leave to appeal is based upon the provisions of P.C. 4600, dated June 7th 1943. This Order in Council contains in part the following recitals:

"WHEREAS the Minister of Justice reports that a very large proportion of the prosecutions for breaches of Wartime Regulations are conducted under Part XV of the Criminal Code relating to summary convictions . . . and that under Part XV aforesaid trials are conducted by magistrates or justices of the peace and there is an appeal to or a trial *de novo* by the County Court . . . and the decision of such Appellate Judge is final;

"AND WHEREAS the Minister further reports that, in many of these prosecutions under Part XV aforesaid, questions of law of first rate importance are not infrequently raised relating to the validity and the construction of wartime regulations and it has been represented to him that, in the interest of uniformity of decisions as well as the true construction of all wartime regulations, further appeals should be allowed to the provincial court of appeal . . . wherever, in the opinion of the court to be appealed to, an important question of law or of mixed law and fact is raised."

The Order in Council proceeds to enact:

"2. In any proceedings under Part XV of the Criminal Code for offences against wartime regulations, an appeal from a judgment of the county or district court judge . . . on any ground of appeal which involves a question of law or of mixed law and fact shall lie to the court of appeal by leave of such court."

It seems plain that, so far as the recitals in this Order in Council are concerned, the questions of law or of mixed law and fact which are in contemplation are questions arising during the hearing of the appeal to the County Judge, which is in the nature of a trial *de novo*. However, in the operative part of the Order in Council the language is "any ground of appeal which involves a question of law". The question as to the jurisdiction of the learned County Judge undoubtedly involves a question of law, and as the operative words are unrestricted they are not to be controlled by the recital. Once it is determined that there is a question of law within the meaning of the operative part of the Order in Council, I agree that the question is one of such importance that leave to appeal should be granted. As the question as to the learned County Court Judge's jurisdiction was fully argued before us, I proceed to consider that question.

By s. 749 of the Code it is provided that (I leave out irrelevant portions) "any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant, may appeal". By clause (a), as it stood before its amendment by 1932-33, c. 53, s. 6, it was provided that in Ontario when "the conviction adjudges imprisonment only" the appeal should be to the Court of General Sessions of the Peace. Since 1933 all appeals in Ontario are heard by the County Court. The importance of the language of the statute before the amendment however, is that it clearly indicates that the sentence is part of the conviction.

In *Harris v. Cooke* (1918), 88 L.J.K.B. 253, the Court had under consideration Reg. 58 of the Defence of the Realm Regulations, which provided that "Any person aggrieved by a conviction of a court of summary jurisdiction under these regulations may appeal in England to a court of quarter sessions". It was held by the King's Bench Division, Darling, Avory and Salter JJ., that "conviction" in the Regulation included both the verdict and the sentence and that an appeal by the person convicted lay where he was complaining of the sentence. The Court held that there could be no appeal against the sentence only, but that the appeal must be against the entire conviction, although the ground of appeal might be that there was error as to the sentence. It was pointed out in that case as well as in *Rex v. Rabjohns* (1913), 82 L.J.K.B. 994 per Bankes J., as he then was, citing Tindal C.J. in *Burgess v. Boetefeur and Brown* (1844), 13 L.J.M.C. 122, 135 E.R. 193, that the word "conviction" is an equivocal word, being sometimes used to mean the verdict and at other times "in its more strictly legal sense" to mean the sentence of the Court. As was held in *Rex v. Rabjohns, supra*, my opinion is that the matter is settled by the language of the statute. There are other provisions of the statute, in addition to s. 749, which point in the same direction.

S. 726 provides that after the justice has heard the evidence he is to determine the matter and "convict" or dismiss the information or complaint. By s. 727, if he "convicts", a minute or memorandum "thereof" may then be made, and "the conviction" shall afterwards be drawn up by the justice in the appropriate statutory form. In this section the words "convicts" and "conviction" are evidently used in two senses, the former to indicate the magistrate's decision, and the latter, the document

later drawn up. In both cases, however, the sentence is included, because the magistrate's decision is to find its way, first into the minute or memorandum, and then into the written document, and the latter, as may be seen by reference to Form 32, which is here the appropriate form, includes the sentence. S. 739(b) may also be referred to. It provides that whenever "a conviction adjudges a . . . penalty . . . the justice by his conviction . . . after adjudging payment of such penalty" may order that in default of payment the defendant be imprisoned. S. 740 is after the same order. S. 751 makes provision, in the case of the dismissal of an appeal, for the appellate court to order the defendant to be punished "according to the conviction." In my opinion it is clear upon these provisions that the "conviction" from which an appeal lies under s. 749 includes both the decision as to guilt and the sentence.

I do not see any reason why the language of s. 749 should be construed as limiting the right of appeal from a conviction to the person convicted. The prosecutor or complainant may well "think himself aggrieved" on legal grounds with respect to the sentence imposed, and there is no reason why he should have no appeal in such case, when a defendant who complains of a sentence, because he considers it too severe, may appeal. It is provided by s. 754 that "in every case" of appeal from a summary conviction, the appellate court may "modify the decision" of the justice and may make such other "conviction" as it thinks fit. The Court of Appeal in Nova Scotia in *Rex v. Morrell* (1934), 7 M.P.R. 312, 61 C.C.C. 247, would appear to have acted on this view of the statute. In *Rex v. Auberbach* (1919), 31 C.C.C. 46, 45 D.L.R. 338, both parties appealed, the appeal of the Crown being with respect to the sentence only. No objection was made that such an appeal did not lie and the case was disposed of on the Crown's appeal. It would be sufficient to say with respect to the judgment of Armour J. in *McLellan v. McKinnon* (1882), 1 O.R. 219 that the statute now is in some respects different. But in any event I do not agree with the view there expressed.

In the case at bar, although the notice of appeal to the County Court is called a "Notice of Appeal against Sentence", it is in fact and in form an appeal against "a certain Order bearing date the 6th day of January 1944 . . . whereby, upon finding the accused guilty on the following charge [describing it] . . .

the accused was ordered to pay a fine of \$150.00. The grounds of appeal are that the sentence does not impose adequate punishment having regard to the gravity of the offence." The appeal then is not against sentence but against the conviction: *Harris v. Cooke, supra*. I do not think it matters that the conviction is described as an "order".

I would therefore allow the appeal and direct that the appeal from the conviction be heard and disposed of in the County Court.

Appeal allowed.

Solicitor for the informant, appellant: J. C. McRuer, Toronto.

Solicitor for the accused, respondent: J. J. Robinette, Toronto.

[COURT OF APPEAL.]

H. v. H.

Divorce and Matrimonial Causes—Alimony—When Wife Entitled to Sue for Alimony, apart from Divorce—History of Legislation—The Judicature Acts, R.S.O. 1897, c. 51, s. 34; R.S.O. 1937, c. 100, s. 2—The Matrimonial Causes Act, R.S.O. 1937, c. 208.

The jurisdiction of the Supreme Court of Ontario to award alimony, in an action brought for that relief alone, is defined in s. 34 of The Judicature Act, 1897, which is in the same words as s. 29 of An Act respecting the Court of Chancery, C.S.U.C. 1859, c. 12 (which in turn was derived from, and superseded, two earlier statutes of the Province of Canada). This jurisdiction is preserved by what is now s. 2 of The Judicature Act, 1937, first enacted in 1913. To succeed in such an action; a wife must establish either (1) that she would be entitled to alimony by the law of England; or (2) that she would be entitled by the law of England to a divorce and to alimony as incident thereto; or (3) that her husband lives apart from her without sufficient excuse and in circumstances which would entitle her, by the law of England, to a decree for the restitution of conjugal rights.

Per Kellock J.A.: Where the parties to a marriage have separated, either voluntarily or pursuant to the terms of an enforceable agreement, and the wife does not desire that they should live otherwise than apart, it cannot be said that the husband is living apart from her without sufficient excuse. *Pardy v. Pardy*, [1939] P. 288, applied.

Per Laidlaw J.A.: The "law of England" by which the wife's rights are to be determined in each of the three sets of circumstances set out in the section is the law of England as it existed when the present Judicature Act first came into operation, i.e., on 1st January 1896. *Cumpson v. Cumpson*, [1934] O.R. 60, followed. The onus is on a plaintiff wife in any case to bring herself within the statutory provisions entitling her to relief. *Bird v. Bird* (1921), 52 O.L.R. 1, applied. As to (1) and (2) above, desertion alone was never a ground upon which the courts in England could grant either alimony alone or a divorce, and a plaintiff who relies on desertion, without more, must therefore bring herself within (3). She must obtain affirmative findings, on the evidence, both that her husband lives apart from her without sufficient excuse (which cannot be the case if the parties have voluntarily separated and the wife has no desire to resume cohabita-

tion) and that the circumstances are such that she would be entitled, by English law, to a decree for restitution of conjugal rights. In granting this last-mentioned remedy, the English courts have exercised a wide discretion, and have asserted a right to ascertain whether the petitioner, by his or her conduct, has disentitled himself or herself to the relief sought. *Bona fides* is an essential foundation for such a claim, and a wife cannot succeed unless she shows a sincere desire for a real restitution of those rights, and a corresponding willingness to render them to her husband. *Palmer v. Palmer*, [1923] P. 180, applied.

Henderson J.A., while he agreed that the wife, in the circumstances of this case, was not entitled to alimony, did not agree with the views expressed by the other members of the Court as to jurisdiction.

AN appeal by the defendant wife (plaintiff by counterclaim) from the judgment of Hogg J., dismissing the counterclaim.

The plaintiff (husband) sued for divorce, and the defendant counterclaimed for alimony. When the action came on for trial, the husband was unable, because of the absence of a material witness, to prove his case, and accordingly offered no evidence. The parties then proceeded to trial on the counterclaim.

24th and 25th February 1944. The action was tried by HOGG J. without a jury at Toronto.

G. Beaudoin, for the plaintiff.

J. R. Cartwright, K.C., for the defendant wife.

B. Weinberg, for the co-defendant.

8th March 1944. HOGG J.:—This is an action by a husband for dissolution of marriage in which there is a counterclaim by the defendant wife for alimony.

The right to grant relief in the nature of alimony in an action for dissolution of marriage, is given by The Matrimonial Causes Act, R.S.O. 1937, c. 208, and nowhere in that Act is the word "alimony" to be found, except in the section which gives the Court power to order the payment of interim alimony. The relief ordinarily called alimony is termed, in the language of the statute, "support and maintenance". However, it seems to be the common practice, in pleading, to claim "alimony" instead of using the words of the statute.

The plaintiff was unable to produce any evidence at the trial tending to show his wife guilty of adultery, and the claim for dissolution of marriage was dismissed, leaving the counterclaim for alimony, or support and maintenance, by the defendant wife, to be disposed of.

Counsel for the defendant, or plaintiff by counterclaim, argued that where a husband who institutes an action against his wife for dissolution of marriage on the ground of adultery fails to

establish such allegation, the effect of the judgment of the Court of Appeal for Ontario in *Weatherall v. Weatherall*, [1937] O.R. 572, [1937] 3 D.L.R. 468, is that because the husband's action for dissolution of marriage fails the wife is therefore entitled to be paid a sum for her support and maintenance by him. After careful perusal of the judgments delivered in the Court of Appeal in that action, I cannot agree with the contention of counsel for the defendant wife that this case decides that support and maintenance must be awarded if the husband's action for divorce fails. The point which the judgment of the Court decided was that in an action for dissolution of marriage where a wife counterclaims for alimony and the husband's action is dismissed, a demand by the wife on her husband, prior to the counterclaim, that he return to cohabitation, is not a necessary condition precedent to the right of the wife to alimony. Fisher J.A. sets out in his judgment the three cases established by The Judicature Act where alimony might be claimed.

The grounds for awarding alimony are, the adultery of the husband, the cruelty of the husband towards the wife, or the desertion of the wife by the husband.

In the present case differences existed between the plaintiff and his wife before February 1941, and at that time they executed a separation agreement in which they agreed to live apart. However, in November 1941, the plaintiff and his wife lived together again for a week, when apparently it was again discovered that they could not get along together. The wife was on very friendly terms at that time with the co-defendant. According to her evidence she lived with her husband for the week in November 1941 in order to attempt to become reconciled with him. She says she would not go back to live with him and that she left him because of acts of cruelty to her. Any acts of alleged cruelty were prior to the reconciliation in November 1941, and were condoned by the wife. The parties apparently saw each other at Christmas time in 1941, when the plaintiff stated he wanted a divorce from her and he did not ask her to come back and live with him after this time.

I find that the wife is not entitled to support and maintenance, or alimony, on the ground of cruelty on the part of her husband towards her. I also find that at the time she came back to her husband in 1941, her conduct with the co-defendant was not such as could possibly lead to a reconciliation. After spending

the week together in November 1941, the parties apparently voluntarily left each other and they have stated they would not live together again.

The judgment in *Frind v. Frind* (1917), 12 O.W.N. 245, by Middleton J., would seem to be in point. That learned judge says: "The case was simply one in which agreement and marital happiness seemed impossible, but in which there was no such misconduct on the husband's part as justified the wife in leaving his home."

Counterclaim dismissed without costs.

15th May 1944. The appeal was heard by HENDERSON, KELLOCK and LAIDLAW JJ.A.

J. R. Cartwright, K.C., for the defendant (plaintiff by counterclaim), appellant: The husband, by suing for divorce on the ground of adultery, stating that he would not have his wife live with him, and cutting off her support, deserted her, and cannot now be heard to say that he is not bound to support her: *Weatherall v. Weatherall*, [1937] O.R. 572, [1937] 3 D.L.R. 468. Certain English decisions on this branch of the law proceed on the English Rules, and it is important not to become confused between the English practice and the substantive law. *Harnett v. Harnett*, [1924] P. 126, for example, is concerned with the application of the English Divorce Rule 175.

Where a husband expresses unwillingness to receive his wife back to live with him, he has no defence to a claim for alimony unless he can establish cruelty or desertion by her: *Gould v. Gould* (1921), 50 O.L.R. 622 at 624, 64 D.L.R. 621. Here the husband stated explicitly that he did not want his wife to come back to him, and would not take her back. She also took the position that, in view of his having falsely charged her with adultery, she would not return to him. In such circumstances the Court has clear jurisdiction to award alimony—a jurisdiction which it possessed and exercised long before The Judicature Act, 1895 (Ont.), c. 12: *Soules v. Soules* (1851), 2 Gr. 299; *Severn v. Severn* (1852), 3 Gr. 431. The English Rules, such as those discussed in *Harnett v. Harnett*, *supra*, and *Palmer v. Palmer*, [1923] P. 180, should not be permitted to supersede the authority of such a case as *Weatherall v. Weatherall*, *supra*; I refer to the discussion of this last-mentioned case in 7 Fortnightly Law Journal 86.

E. L. Sparling, for the plaintiff (defendant by counterclaim), respondent: Our case is based mainly upon the conduct of the wife. Where the parties agree to separate there is no desertion on the part of the husband: *Charter v. Charter* (1901), 84 L.T. 272; *Harris v. Harris* (1896), 3 Terr. L.R. 416 at 429. The appellant has not shown that her husband is living apart from her without her consent, and she is therefore not entitled to alimony. [HENDERSON J.A.: Where the parties are living separately, and the husband brings an action for divorce, alleging adultery, and fails, can he say that he has done all this with her consent, and is not bound to support her?] The only jurisdiction in this Court to award alimony is based upon desertion, which has not been established: *Gardner v. Gardner*, [1937] O.W.N. 500.

A plaintiff claiming alimony in Ontario must establish one of three things: (a) adultery; (b) cruelty; or (c) desertion. The appellant has failed to prove any of these.

J. R. Cartwright, K.C., in reply: This Court has all the jurisdiction of the old Court of Chancery. The Judicature Act 1895 did not restrict this jurisdiction. It was the husband here who desired the marriage to end: his conduct caused the termination of cohabitation, and he is consequently guilty of desertion: *Sickert v. Sickert*, [1899] P. 278 at 282; *Kay v. Kay*, [1904] P. 382. *Gardner v. Gardner*, *supra*, was wrongly decided, and should be overruled. The English cases which hold that a wife, as a prerequisite, must show a sincere *bona fide* desire for a real resumption of conjugal rights, are based on a particular English Rule, and are not applicable. I refer also to *Howe v. Howe et al.*, [1937] O.R. 57, [1937] 1 D.L.R. 508.

Cur. adv. vult.

23rd June 1944. HENDERSON J.A.:—This is an appeal from that part of a judgment of the Honourable Mr. Justice Hogg, dated 8th March 1944, whereby he dismissed a counterclaim for alimony made by the appellant in an action brought by her husband asking for dissolution of their marriage. The action was also dismissed, but no appeal has been taken from that part of the judgment.

I have had the privilege of reading the opinions of my brethren Kellock and Laidlaw, and I agree with them that in this case the appellant is not entitled to alimony.

With reference to the question as to the jurisdiction of this Court to entertain the counterclaim, I am unable to agree with the views expressed by my brethren. An action for judicial separation, or an action for restitution of conjugal rights, has never been known to our jurisprudence, and I take the view that our jurisdiction in alimony actions is not confined to actions in which that relief would be given in England. I refer to *Johnston v. Johnston*, [1942] O.W.N. 47 and the authorities I there cited, but in view of the fact that in this particular case I agree with my brethren in the result, I refrain from further discussion of the authorities.

KELLOCK J.A.:—In this case the wife appeals from the judgment of Hogg J., dated 8th March 1944, dismissing her counter-claim for alimony, made in an action for divorce brought against her by her husband. The action was dismissed, the husband failing to offer any evidence when his application for an enlargement was refused.

The respondent husband is a member of the Royal Canadian Air Force. The parties had been living apart under the terms of a separation agreement, but in November 1941 they renewed cohabitation for a short time at Victoriaville, P.Q. The appellant thereafter left her husband to attend her mother, who was ill in Toronto, and the parties did not see each other until Christmas Day of the same year.

The evidence is somewhat scant as to the discussion which took place between the parties at that time, but the appellant put in as part of her case certain questions and answers of the respondent on discovery, in which he said that "We didn't seem to hit it off", and "I told her then to institute proceedings for a divorce, and she agreed to do it". It is not shown what, if any, grounds existed for such an action, and the appellant did not institute such proceedings. It is to be observed that in what passed between the parties nothing was said as to any maintenance of the wife, but the respondent continued to permit his wife to receive assigned pay and separation allowance until December 1942, when he brought the action against her for divorce.

The respondent stated in evidence that he had not asked, and did not ask, that his wife return to him, and the appellant for her part said in the witness-box that she did not want to

return to live with him. The learned judge dismissed the counterclaim on the ground that "the parties apparently voluntarily left each other and they have stated they would not live together again."

Mr. Cartwright argues: (1) that nothing occurred in December 1941 which put an end to the liability of the husband to maintain his wife, and that that situation still exists; (2) that the respondent is guilty of desertion; (3) that jurisdiction with respect to alimony was exercised by the courts of this Province prior to 1857; (4) that such jurisdiction continues quite apart from that conferred by s. 34 of The Judicature Act, R.S.O. 1897, c. 51; and (5) that the appellant would have been entitled to a decree prior to 1857, and is accordingly now entitled.

In exercising jurisdiction with respect to alimony prior to 1857, the Court of Chancery acted under the provisions of "An Act to Establish a Court of Chancery in this Province", 7 Wm. IV (Can.), c. 2, s. 3, which provided that "The said Court of Chancery shall have the like power, authority and jurisdiction, in all cases of claim for Alimony that is exercised and possessed by any Ecclesiastical or other Court in England." By "An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery", 20 Vict., c. 56, assented to 10th June 1857, it was provided, by s. 2, that "The said Court shall also have jurisdiction to decree alimony to any wife whose husband lives separate from her without any sufficient cause, and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights". By s. 29 of c. 12 of the Consolidated Statutes of Upper Canada, 1859, "An Act respecting the Court of Chancery", the two provisions above mentioned were consolidated in the form found in R.S.O. 1897, c. 51, s. 34,* but the language of 7 Wm. IV, c. 2, s. 3 was not followed in the Consolidated Statutes. The law as contained in this section was not subsequently re-enacted in terms, but was perpetuated by later legislation in general terms.

* S. 30 of The Judicature Act 1895, c. 12, which became s. 34 in R.S.O. 1897, c. 51, read as follows:

"The High Court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights; and alimony when granted shall continue until the further order of the Court."

By s. 8 of the Act entitled "An Act Respecting the Consolidated Statutes for Upper Canada", C.S.U.C. 1859, c. 1, it was provided that the Consolidated Statutes should not be held to operate as new laws, but should be construed and have effect as a consolidation, and as declaratory of the law as contained in the Acts and parts of Acts repealed for which the Consolidated Statutes were substituted. S. 9 provided that if upon any point the provisions of the Consolidated Statutes were not in effect the same as those of the repealed Acts and parts of Acts for which they were substituted, then as respects transactions, matters and things subsequent to the time when the Consolidated Statutes took effect, the provisions contained in them should prevail. As already mentioned, there was a change in the language so far as the statute of 7 Wm. IV was concerned.

It is not suggested in the case at bar that the facts bring it within the earlier part of s. 34 of the 1897 Act, which stems from the last-mentioned statute. That being so, it is not material to inquire what the situation would have been prior to the enactment of the Consolidated Statutes. If the language of the Consolidated Statutes is "not in effect the same" as the language of the Act of 1837, as it is not, the latter is to prevail. This case, therefore, is to be decided under the latter part of s. 34, which stems from 20 Vic. c. 56, s. 2. Accordingly, the appellant must establish that the respondent "lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights".

In considering these requirements it is necessary to refer, with some greater particularity, to the record.

At the opening of the trial the following occurred:

"Mr. Cartwright: My Lord, perhaps in the hope of saving a little of the Court's time I might be allowed to ask my friend what is his attitude on the counterclaim. As I understand it the husband has obviously told the wife that he will not live with her any more. He is suing her for divorce. On his examination for discovery that is the position he took, and if that is so, the divorce action having been dismissed, it seems to me it is only a question of quantum."

A little later:

"Mr. Beaudoin: I think my friend should state his position and let his client state that she would not go back with him.

"Mr. Cartwright: No. She does not, my Lord. I have no hesitation in stating my client's position. Of course, she won't go back."

The following occurred in cross-examination of the appellant:

"Q. In November you were down with your husband a week and when you came back you saw Orenstein [the co-defendant] after that? A. Yes.

"Q. How often per week did you see him after you came back from Victoriaville? A. The same.

"Q. Once a week and some weeks twice a week? A. Yes.

"Q. Were you keeping company with any other man while going with Orenstein? A. Yes.

"Q. How often would you be out with other men? A. Perhaps once a week.

"Q. You were with Orenstein once a week and some other men once a week? A. Yes.

"Q. Going to supper dances at the Royal York and King Edward Hotels? A. Yes.

"Q. Were you out of town with Mr. Orenstein? A. I have travelled with him.

"Q. Where to? A. Hamilton and London."

It may be that the true view as to the situation between the parties when they separated in December 1941 is that they merely decided to live apart from each other without any promise on the part of the respondent to pay the appellant anything. If so, the appellant, on her own evidence, does not desire any change, except that she wishes to be maintained by the respondent. Clearly in such circumstances it cannot be said that the husband is living apart from his wife without any sufficient cause: *Pardy v. Pardy*, [1939] P. 288.

In *Pardy v. Pardy*, *supra*, at p. 306, the Master of the Rolls says: "I may summarize my opinion by saying: (1) that where the original separation was by mutual consent, desertion may supervene without the necessity of a resumption of cohabitation; (2) that this can happen where (a) on the part of the spouse alleged to be in desertion there is repudiation of the agreement under which separation took place, no step taken towards the resumption of cohabitation in fact, and, in addition to repudiation, the animus deserendi, and (b) on the part of the spouse alleging desertion there is not only no insistence on the terms of the separation agreement, but a *bona fide willingness to resume*

cohabitation without regard to its terms—in short, if it can be said that both parties are during the relevant period in truth regarding the agreement as a dead letter, which no longer regulates their matrimonial relations; (3) that whether or not these conditions exist during the relevant period is a question of fact in each case, the answer to which depends upon the true inference to be drawn from the words and conduct of the parties.” The fourth head given by the Master of the Rolls is not applicable here.

Whether, therefore, the separation is a voluntary one, or a separation on the terms of an enforceable agreement, the result is the same. The appellant here is not in a position to show that the respondent is living apart from her without any sufficient cause when she does not desire anything but that he should live apart from her. It does not advance her case, therefore, to conclude that the parties separated in December 1941, under an agreement having as one of its terms that the respondent would pay the appellant a definite sum periodically. It is to be observed that no such agreement is pleaded. The counterclaim is simply for alimony. I would therefore dismiss the appeal with costs.

LAIDLAW J.A.:—The appellant is the wife of the respondent and appeals from that part of a judgment of Hogg J., dated 8th March 1944, whereby he dismissed a counterclaim for alimony made by her in an action brought by her husband asking for dissolution of their marriage. The action was also dismissed, but no appeal has been taken from that part of the judgment.

The parties were married on 26th June 1937. Early in 1938 marital difficulties and trouble commenced, and they continued until February 1941, when a separation agreement was made and they lived apart until November of the same year. The appellant then returned to her husband and resumed cohabitation with him for about one week. After that time she went to the home of her parents and has not since lived with the respondent. The respondent was then a member of the Air Force stationed at Victoriaville, Quebec. On Christmas Day 1941, during a leave of absence, he visited the appellant at her parents' home in Toronto and had dinner with her at that place. Some days afterwards, when he was returning to Victoriaville, she went to the railway station with him. He told her they could not get

along together, and according to evidence given by him on examination for discovery and used by the appellant (as permitted by the Rules of Practice) as part of her case, "I told her then to institute proceedings for a divorce, and she agreed to do it, and that was the end of that."

She did not commence proceedings, but a writ of summons was issued by him on the 3rd December 1942. In the statement of claim it is alleged that the appellant engaged in adulterous intercourse with her co-defendant Charles Orenstein. That allegation was denied by the appellant, and in her counterclaim she alleges acts of cruelty on his part and asks for alimony (interim and permanent). It is set forth that from the month of December 1941, until about 30th November 1942, payments were made by the respondent for the maintenance and support of the appellant but that "Since December, 1942, the plaintiff has refused to supply this defendant with the necessities of life or with sufficient funds to maintain her in accordance with her station in life and the means of the plaintiff."

When the matter came on for trial the plaintiff did not adduce any evidence in support of the allegations made by him. Counsel on his behalf stated he was unable to do so by reason of the absence of a necessary witness, who could not be found at that time. The appellant was unwilling, by reason of earlier postponements and much delay, to consent to further adjournment of the trial, and, accordingly, the action was dismissed. Evidence was given in support of, and in defence to, the counterclaim. The learned trial judge made the following findings of fact:

(1) "Any acts of alleged cruelty were prior to the reconciliation in November, 1941, and were condoned by Mrs. Hawn."

(2) "At the time Mrs. Hawn came back to her husband in 1941 her conduct with Orenstein was not such as could possibly lead to a reconciliation."

(3) "After spending the week together in November, 1941, the parties apparently voluntarily left each other".

The learned trial judge concluded "that the wife is not entitled to support and maintenance or alimony on the ground of cruelty on the part of her husband towards her."

The grounds of appeal urged by counsel on behalf of the appellant are: (1) that the Court possesses a jurisdiction apart from and in addition to that conferred upon it by the provisions of The Matrimonial Causes Act, R.S.O. 1937, c. 208, and in the

exercise of such powers ought to have granted alimony to the appellant on the ground of desertion or cruelty, or both; and (2) that the evidence did not disclose any defence to the appellant's claim for alimony.

The jurisdiction of the Court to make an order for payment of alimony is not defined by existing legislation in a satisfactory manner. It is described in The Judicature Act, R.S.O. 1937, c. 100, s. 2. Jurisdiction to make an order to secure a gross or annual payment by the husband or payment of a monthly or weekly sum for the support and maintenance of a wife is set forth in The Matrimonial Causes Act, R.S.O. 1937, c. 208.

The Judicature Act, s. 2, *supra*, provides that "The Supreme Court . . . shall have all the jurisdiction, power and authority which on the 31st day of December, 1912, was vested in or might be exercised . . . by the High Court of Justice" This section was reproduced from R.S.O. 1927, c. 88, s. 2, formerly R.S.O. 1914, c. 56, s. 3, and originally appeared as section 3 of chapter 19 Statutes of Ontario 1913 (3-4 Geo. V).

The jurisdiction, power and authority exercisable by the High Court of Justice on the 31st day of December 1912, is found in c. 12 of the Statutes of Ontario 1895 (58 Vict.), s. 30. This statute, cited as "The Judicature Act 1895", was a consolidation of the Acts governing the Supreme Court of Judicature of Ontario, and came into operation on the first day of January 1896 (s. 1; order-in-council approved 27th December 1895). It was repealed when The Judicature Act as contained in the Revised Statutes of 1897 came into effect, but it was expressly provided by 60 Vict., c. 3 (An Act to provide for the Consolidation of the Statutes of Ontario), s. 9(1), that "The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation of the law as contained in the Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted", and by s. 9(2) "The various provisions in the Revised Statutes corresponding to and substituted for the provisions of the Acts and parts of Acts so repealed, shall . . . be held to operate retrospectively as well as prospectively, and to have been passed upon the days respectively upon which the Acts and parts of Acts so repealed came into effect."

But no such provision preserved the laws as contained in the statutes in force prior to the time The Judicature Act 1895

came into operation. That Act operated as a new law from the date it came into effect. It may be observed, however, that the section under discussion (s. 30 of The Judicature Act 1895, *supra*) first appears in the Consolidated Statutes for Upper Canada 1859, c. 12, s. 29, which Act repeals earlier statutes (s. 5; schedule A., pp. 1046 to 1049) including 7 Wm. IV, c. 2 (1837) where, by section III, the Court of Chancery was first given "like power, authority and jurisdiction, in all cases of claim for alimony that is exercised and possessed by an Ecclesiastical or other Court in England": also 20 Vict. c. 56 (1857) which by s. 2 first vested jurisdiction in the Court of Chancery in the following words, *viz.*: "the said Court shall also have jurisdiction to decree alimony to any wife whose husband lives separate from her without any sufficient cause, and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights" S. 29 of C.S.U.C. 1859, c. 12, *supra*, was carried into R.S.O. 1877, c. 40, s. 43; into R.S.O. 1887, c. 44, s. 29, and was thereafter repealed by 58 Vict. c. 12, s. 192.

It is now desirable and necessary to set forth the classes of cases in which the Court had, and now possesses, jurisdiction under The Judicature Act 1895 to order the payment of alimony. Alimony may be granted to any wife who (1) would be entitled to alimony by the law of England, or (2) would be entitled, by the law of England, to a divorce and to alimony as incident thereto, or (3) to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights.

It will be observed that in all cases the right to alimony is determined by reference to the law of England. The phrase "by the law of England" means the law of England as it existed at the time The Judicature Act 1895 came into effect, *viz.*, 1st January 1896: *Cumpson v. Cumpson*, [1934] O.R. 60 at 63, [1934] 1 D.L.R. 461. Under that law the Court possessed powers from two sources: (1) from the ecclesiastical law, and (2) under The Matrimonial Causes Act 1857 (20-21 Vict. c. 85), and amendments thereto.

The ecclesiastical law made two remedies available to a complaining wife: (1) a decree for divorce *a mensa et thoro* (judicial separation); (2) a decree for restitution of conjugal rights. A decree for divorce *a mensa et thoro* might be granted

on the ground of adultery or on the ground of cruelty of the husband. To support such a decree, cruelty had to be of a kind which made cohabitation of the wife and husband practically impossible. There must be danger to life, limb or health by reason of the alleged conduct: *Evans v. Evans* (1790), 1 Hag. Con. 35, 161 E.R. 466, per Sir William Scott (Lord Stowell) at p. 38; cited in *Milford v. Milford* (1866), L.R. 1 P. & D. 295 at 299, affirmed (1868), 37 L.J.P. & M. 77; *Russell v. Russell*, [1897] A.C. 395 per Lord Davey at p. 467.

In proceedings for divorce *a mensa et thoro* the ecclesiastical courts had power to order payment of alimony to the wife. But such power was exercised as an incident to the making of a decree, and not as a separate remedy. Desertion was not an offence known to the ecclesiastical or common law of the land: *Brookes v. Brookes* (1858), 1 Sw. & Tr. 326 at 327, 164 E.R. 750. The only remedy for desertion was a suit for restitution of conjugal rights. (See Halsbury's Laws of England, 2nd ed., vol. 10, p. 654). There is no case in which a decree of alimony was granted before 1857 on the ground of desertion.

I examine the jurisdiction of the Ecclesiastical Court to grant a decree of restitution of conjugal rights. It was the policy of that Court to maintain cohabitation and to compel married persons to live together. Nothing could be pleaded, as a bar to a suit for restitution, but what would entitle the defendant to a judicial separation. Thus, the only defences to such a suit were adultery or legal cruelty on the part of the petitioner.

The Matrimonial Causes Act 1857 (Imp.), c. 85, provided for the establishment of "The Court for Divorce and Matrimonial Causes." The powers formerly exercised by the ecclesiastical courts were not taken away by this Act, but continued to be exercisable by the new court: *Goodden v. Goodden*, [1892] P. 1 at 3. But the statute made a number of important changes in the law existing theretofore. (1) By s. 16, it made "desertion without cause for two years and upwards" a matrimonial offence. (2) By s. 17, the Court might grant a decree of judicial separation or restitution of conjugal rights on the ground of adultery, cruelty or desertion without cause for two years and upwards. (3) By the same section the Court was given power to make any order for alimony which shall be deemed just where an application was made by the wife for a decree of judicial separation or restitution of conjugal rights. (4) By s. 27 power was given

to the Court to pronounce a decree dissolving a marriage, upon a wife's petition, upon the ground that "her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards". (5) By s. 32 the Court was empowered, "if it shall think fit, on any such decree, [to] order that the husband shall . . . secure to the wife [a] gross or annual sum of money".

By s. 22 the Court is required to "proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief".

The Matrimonial Causes Act 1857 was amended before 1895 as follows: 1858 (21-22 Vict. c. 108); 1859 (22-23 Vict. c. 61); 1860 (23-24 Vict. c. 144); 1864 (27-28 Vict. c. 44); 1866 (29-30 Vict. c. 32); 1868 (31-32 Vict. c. 77); 1873 (36-37 Vict. c. 31); 1878 (41-42 Vict. c. 19); 1884 (47-48 Vict. c. 68). The only amendment which need be presently considered is The Matrimonial Causes Act 1884, *supra*. This Act was of far-reaching consequence, and resulted in a great change in the decisions of the Court. Up to the time of passing of that statute, as previously discussed, the only bar to a suit for restitution of conjugal rights was such as would entitle the defendant to a judicial separation. In the absence of such a defence no discretion to refuse a decree was possessed by the Court. The effect of the Act was discussed in *Russell v. Russell*, [1895] P. 315. per Lopes L.J. pp. 329 to 334, and a change of view was introduced by this decision. See also *Walter v. Walter*, [1921] P. 302.

It is pointed out by Gorell Barnes J. in *Oldroyd v. Oldroyd*, [1896] P. 175 at p. 183, that the Court of Appeal in *Russell v. Russell*, *supra*, did not hold that the Court was to exercise a general discretion in granting or refusing a decree of restitution. But the view has been expressed that "in recent years the Court has shown a tendency to take the view that its powers to refuse a decree are so wide as virtually to amount to a general discretion to determine whether the petitioner by his or her conduct has lost the right to *consortium vitae*": Rayden on Divorce, 4th ed. p. 76 note (c), referring to *G. v. G.*, [1930] P. 72; *Russell v.*

Russell (1935), 80 Sol. Jo. 16. I agree with that view. It has been held that extravagance of living on the part of the wife affecting the financial position and prospects of the husband is sufficient ground for refusing a decree: *G. v. G., supra*.

Upon an application for a decree for restitution the Court is entitled to consider the *bona fides* of the applicant. *Bona fides* is the essence of the right to relief. In *Palmer v. Palmer*, [1923] P. 180, Atkin L.J., at p. 183, said "If the judge had been satisfied that there was no desire upon the part of the wife to return to her husband that would have been a ground for refusing to grant the decree." It is essential that the petitioner should prove that he or she has a sincere desire for a real restitution of those rights and a corresponding willingness to render them to the other spouse. See also *Mann v. Mann*, [1922] P. 238; *Parkes v. Parkes* (1923), 40 T.L.R. 42 at 43. *Harnett v. Harnett*, [1924] P. 126; *Gardner v. Gardner*, [1937] O.W.N. 500 at 504.

This requirement is not dependent upon a rule of practice, but seems to me to be founded on common sense and reason. It would be nonsensical and frivolous to invite and urge the Court to make an order for restitution of rights which the petitioner does not want and which he or she is not willing to give to the other spouse.

I come to these conclusions: (1) that by the law of England as it existed in 1895 the Court could, on an application for restitution of conjugal rights, take into consideration the conduct of the petitioner, and on that ground refuse a decree, and (2) that the petitioner must show that he or she possessed "a sincere desire for a real restitution of those rights and a corresponding willingness to render them to the other spouse."

It must be apparent that the legislation in this Province defining the jurisdiction of the Court in case of a claim for alimony is set forth in a most unsatisfactory form. It is contained in the all-embracing words of The Judicature Act, R.S.O. 1937, c. 100, s. 2, *supra*, whereby in 1944 the Supreme Court is possessed of all the jurisdiction, power, and authority which was vested in or might be exercised by the High Court of Justice on a named day thirty-two years ago. That jurisdiction, power and authority is described in a statute passed more than forty-nine years ago, and the jurisdiction of our Court is measured by the law of that date—not our law, but the law of England as

then existing. Moreover the jurisdiction is defined in two classes of cases by reference to remedies which our Court did not and could not then give, *viz.*, divorce and restitution of conjugal rights. Nevertheless this undesirable, unsatisfactory and uncertain state has existed since 1857 (20 Vict. c. 56, *supra*), and the indefinite powers described in The Consolidated Statutes of Upper Canada 1859, *supra*, have been copied verbatim into each successive revision and consolidation of statutes (until 1913, c. 19, *supra*), without any apparent effort to clarify a most important but vastly perplexing matter.

It is unnecessary in the present case to discuss at length the jurisdiction conferred on the Court by The Matrimonial Causes Act, R.S.O. 1937, c. 208, (first found in statutes of Ontario, 1931 c. 25). It is sufficient to say that the powers therein contained are exercisable by the Court "in any action for divorce or to declare the nullity of any marriage." The counterclaim made by the appellant is an action within the meaning of our Rules of Practice. But the appellant does not seek relief of the kind to which the Act applies, and counsel does not rely on the exercise of the jurisdiction of the Court contained therein.

I proceed now to apply the principles of law, as discussed, to the facts of the case in appeal. Counsel argues that the appellant is entitled to alimony on the ground of desertion by her husband and also, or in the alternative, on the ground of his acts of cruelty. On the ground of desertion the case does not fall within the class in which our Court has power to grant alimony to any wife "who would be entitled to alimony by the law of England". If the facts showed desertion without cause for two years and upwards, the appellant might, by the law of England in force in 1895, have applied under the statutes in force for a decree of judicial separation or of restitution of conjugal rights, and on such application (subject to the view of the Court as to her conduct) she might have obtained an order for the payment of alimony as incident to such a decree. Under the ecclesiastical law she might petition for a decree of restitution on the ground of desertion without regard to any period of time. But there was no jurisdiction in the Court, either under the statutes then in effect or derived from the ecclesiastical law, to award alimony on the ground of desertion apart from such proceedings. In the second class of cases in which our Court has jurisdiction to grant alimony, *viz.*: "to any wife who would be

entitled by the law of England to a divorce and to alimony as incident thereto", the appellant cannot succeed on the ground of desertion alone, because by the law of England she must show "adultery coupled with desertion, without reasonable excuse, for two years or upwards" to entitle her to a decree of divorce. Counsel urges that the facts fall within the third class of case in which our Court may grant alimony:—"to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights". The onus is on the applicant for relief to bring her case within the statute: *Bird v. Bird*, 52 O.L.R. 1, [1923] 1 D.L.R. 528.

Both requisites set forth in the statute must be satisfied, and the appellant must obtain findings on the evidence (1) that her husband "lives separate from her without any sufficient cause", and (2) that it is "under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights". In my opinion the appellant has failed to establish either of these essential facts. I think the respondent had sufficient cause to live separate from his wife. Her behaviour as a married woman may have fallen short of adultery, but it was indecent and inexcusable. She admittedly associated with men in circumstances more than suspicious. From 1938 to the time of separation, and afterwards, she was frequently in company with men of whom her husband disapproved. She admits that she travelled to Hamilton and London with her co-defendant. On one occasion she was found by her husband in her mother's apartment at about eight o'clock in the morning in company with another woman and a man who was then in a state of undress.

I do not overlook that certain of the acts of misconduct to which I referred occurred before the parties resumed cohabitation in November 1941. But that answer will not avail, because after the attempt at reconciliation the appellant continued in a wrongful course of conduct. On Christmas Day 1941, after having dinner with her husband at her mother's home, she went out for the evening with her co-defendant Orenstein, and her habits and behaviour appear to have been of the same disgraceful character after the period of cohabitation as before. Marital happiness was impossible by reason of her wrong-doing. She had no sense of her marriage obligations, nor regard for her

solemn vows. She did not honour her husband, but persisted in doing things which could only bring dishonour to him. She made no attempt to cherish his love, affection, or even respect. She could not reasonably expect her husband to find any comfort, happiness or pleasure in living with her. Even less could she hope for maintenance and support from her husband under such circumstances. The law gives to a woman many benefits and advantages not possessed by a man, but the burden put upon him when he unites in marriage with a woman for better or for worse ought not to include the obligation to make payments to her from his earnings under circumstances where she chooses to follow a course of gross misconduct. While the policy of the law in early days was to compel married persons to live together, regard ought to be had to the changed and changing conditions of society. The right to alimony is founded on necessity, and perhaps the need which once existed has in many cases now disappeared in these days of equal rights and opportunities for men and women alike.

Would the appellant be entitled by the law of England in 1895 to a decree for restitution of conjugal rights on the ground of desertion? I think she would not. She would fail for two reasons: first, because her conduct was such that the Court ought properly to refuse such a decree, and, second, because she has failed to prove a sincere desire for real restitution and lacks entirely the essential of good faith. There was no willingness on the part of the appellant to render conjugal rights to her husband. She was unwilling to do so.

Finally, the learned trial judge finds that after spending the week together in November 1941, the parties voluntarily left each other. That finding is well founded in evidence. I accept it, and it precludes a finding that the appellant was deserted by the respondent. I think she was not deserted, but was willing, and perhaps anxious, to live separate from her husband.

Counsel for the appellant relies on the case of *Weatherall v. Weatherall*, [1937] O.R. 572, [1937] 3 D.L.R. 468. The question decided in that case is correctly stated in the headnote as follows:

"Where a husband brings an action against his wife for divorce and the wife counterclaims for alimony, and the husband's action is dismissed, a demand by the wife on her husband prior to the counterclaim that he return to cohabitation is not a necessary condition precedent to the right of the wife to alimony:

Scott v. Scott, 64 O.L.R. 422, [1930] 1 D.L.R. 53, and *Howe v. Howe et al.*, [1937] O.R. 57, [1937] 1 D.L.R. 508, considered."

Nothing was decided which in any way conflicts with the views I now express. The decision cannot be extended as authority to support the appellant's claim for alimony on the ground of desertion. My conclusion, therefore, is that the appellant is not entitled to alimony on that ground.

It remains to consider whether the appellant can succeed on the ground of alleged acts of cruelty on the part of the respondent. Those acts occurred before November 1941, and the learned trial judge has found that they were condoned by the appellant. I accept that finding. There was no evidence of any act of cruelty after the parties cohabited in November 1941. The condonation by the appellant of the acts complained of on the part of her husband was not avoided by any subsequent misconduct, and she was not in a position to rely upon those acts in support of her claim. In any event, the evidence does not disclose treatment of the appellant by the respondent "likely to produce, or which did produce, physical illness or mental distress of a nature calculated to affect her bodily health, or to such treatment as was likely to endanger her reason, and that there was reasonable apprehension that it would continue." The appellant did not establish danger to life, limb, or health: *Evans v. Evans*, *supra*; *Milford v. Milford*, *supra*; *Russell v. Russell*, *supra*; *Bagshaw v. Bagshaw* (1920), 48 O.L.R. 52 at 53, 54, 54 D.L.R. 634.

The law of England in 1895 did not give the Court power to grant alimony on the ground of cruelty apart from an application for a decree of judicial separation or for restitution of conjugal rights. It is difficult therefore to find jurisdiction in our Courts to entertain such a claim. But the Court of Chancery proceeded to exercise such authority after it was established in 1837 and continued thereafter to do so. Its power was challenged, but without success: *Soules v. Soules* (1851), 2 Gr. 299; *Severn v. Severn* (1852), 3 Gr. 431. It is now too late seriously to raise the question, but in the making of an order for payment on the ground of cruelty the Court has adhered to the principles as followed in *Bagshaw v. Bagshaw*, *supra*. The appellant fails to establish a right to alimony on the ground of alleged cruelty

of her husband, as well as on the ground of alleged desertion. Therefore the appeal ought to be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the defendant (plaintiff by counterclaim), appellant: Harry Rotenberg, Toronto.

Solicitor for the plaintiff (defendant by counterclaim), respondent: Gerard Beaudoin, Toronto.

[COURT OF APPEAL.]

Canadian Leaf Tobacco Co. Ltd. v. The City of Chatham.

Taxation—Municipal Business Assessment—Business of Manufacturer—Lands Used “for purpose of” such Business—The Assessment Act, R.S.O. 1937, c. 272, s. 8(1)(e).

Where a company, whose business is that of a manufacturer, uses lands for the purpose of that business, it is liable to be assessed for business assessment, in respect of the lands so used, at the rate set out in clause (e) of s. 8(1) of The Assessment Act. It is not necessary that manufacturing should actually be carried on on those lands. *Re Hiram Walker & Sons Limited and Town of Walkerville* (1917), 40 O.L.R. 154, and later authorities, followed; *Re The City of Chatham and The Canadian Leaf Tobacco Co.*, [1938] O.W.N. 265, not followed. There is nothing in clause (e) to warrant a construction whereby the occupation or use of one particular parcel of land employed in carrying on the business of a manufacturer will distinguish it, for purposes of business assessment, from any other parcel used or occupied for the purposes of the same business. Other clauses are differently worded, and the decision in *Loblaw Grocerterias Co. Limited v. The City of Toronto*, [1936] S.C.R. 249, which was based upon what is now clause (d), is not applicable to the construction and application of clause (e).

Estoppel—Res Judicata—Decisions as to Assessments in Different Years.

In matters of assessment for taxation, where a new assessment is made each year, the decision of a court on an appeal with respect to one year's assessment will not constitute *res judicata* with respect to a fresh assessment, made in a subsequent year. *Broken Hill Proprietary Company, Limited v. Municipal Council of Broken Hill*, [1926] A.C. 94 at 100, applied.

AN appeal by stated case from the judgment of GROSCH CO. Ct. J., of the County Court of the County of Kent. The facts are fully stated in the reasons for judgment.

12th June 1944. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and GILLANDERS JJ.A.

J. R. Cartwright, K.C., for the appellant: There are two main points. We submit, first, that on the facts as found we are not liable to be assessed as a manufacturer in respect of this land,

and, secondly, that the matter is *res judicata* because of the decision between the same parties in *Re The City of Chatham and The Canadian Leaf Tobacco Co.*, [1938] O.W.N. 265, [1938] 3 D.L.R. 430.

Before this assessment can properly be made, it must be shown that we occupy and use the premises for the purpose of manufacturing tobacco: the 1938 case, *supra*, is a decision between the same parties, and relates to the same building, except that it has since been physically enlarged. There is nothing to suggest that there has been a substantial change in the circumstances, and this Court should therefore follow that decision, even if a different view was taken in such cases as *Re The City of Toronto and Belding Corticelli Ltd.*, [1939] O.R. 409, [1939] 3 D.L.R. 73. [ROBERTSON C.J.O.: There is also *Re Studebaker Corporation of Canada Limited and City of Windsor* (1919), 46 O.L.R. 78, 49 D.L.R. 326.] Where this Court finds conflict among its own previous judgments, it can select the one to follow.

If the doctrine of *res judicata* is not applicable, then the 1938 decision should be followed on the principle of *stare decisis*. [HENDERSON J.A.: Do you agree that there is a line of cases saying that it is the business carried on by the owner of the land which must be looked at, rather than the use to which the particular piece of land is put?] Yes, there are at least three cases which take that view, though they are distinguishable on the facts. In *Kelvinator of Canada Limited v. City of London*, [1942] O.W.N. 485, the raw materials came first to the storage premises. [GILLANDERS J.A.: In the *Studebaker* case, *supra*, the garage was entirely separate.] [ROBERTSON C.J.O.: It is not the business of manufacturing that is the test, but the business of a manufacturer.] It has been found as a fact that the manufacturing is done at the St. Clair Street plant. In all the cases where such a tax has been upheld, there have been some acts of the business itself carried on at the premises in question: *City of Toronto v. Lever Brothers Limited*, [1942] O.R. 421, [1942] 3 D.L.R. 468; the *Belding Corticelli* case, *supra*, and the *Kelvinator* case, *supra*.

It must be conceded that, apart from the 1938 decision, there would have been real difficulty in attacking this assessment. That judgment, however, was a decision of this Court on identical facts, and the matter is therefore *res judicata*: *Hoystead et al.*

v. Commissioner of Taxation, [1926] A.C. 155. [ROBERTSON C.J.O.: I am of the view that the 1938 decision is incorrect in following *Loblaw Groceterias Co. Limited v. The City of Toronto*, [1936] S.C.R. 249, [1936] 3 D.L.R. 346, which was an entirely different case.]

G. W. Mason, K.C. (A. L. Hanna, with him), for the respondent: In the 1938 case, it appears from the reasons for judgment that it was found that the premises there in question were used for "storage", and the sole matter for determination was whether that business was carried on in the premises. Here, the only similarity to the former decision is in the parties involved. The properties have changed, and these premises are now an integral part of the business of the appellant. The appellant uses these lands for the purpose of a manufacturing business, and they must therefore be assessed upon the same basis as the St. Clair Street property. Even had the 1938 case not been distinguishable on the facts, the principle of *res judicata* is inapplicable, because where a separate assessment is made each year, a judgment on one year's assessment is not *res judicata* in respect of an assessment for a subsequent year: *Broken Hill Proprietary Company, Limited v. Municipal Council of Broken Hill*, [1926] A.C. 94 at 100; *Re Ontario and Minnesota Power Co. and Town of Fort Frances* (1915), 8 O.W.N. 303, 22 D.L.R. 881.

J. R. Cartwright, K.C., in reply: There is nothing in the report of the 1938 case to suggest that these premises were then used for storage. [HENDERSON J.A.: Your difficulty is that in assessment cases there is no such thing as *res judicata*.] That is true in many cases, because conditions may change from year to year, but that is not so in this instance.

Cur. adv. vult.

29th June 1944. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal upon a stated case, pursuant to s. 85 of The Assessment Act, R.S.O. 1937, c. 272, from the judgment of Judge Grosch, of the County Court of the County of Kent, dismissing an appeal from the Court of Revision of the City of Chatham, which confirmed the appellant's business assessment.

The appellant is a manufacturer of tobacco, and is assessed as such in respect of certain premises on St. Clair Street in that municipality, where its tobacco is processed. The appellant

did not appeal against its assessment as a manufacturer in respect of the St. Clair Street premises. The appellant also occupies, for the purposes of its business, other premises in Chatham on Patteson Avenue and on Colborne Street. The appeal now before us is against its business assessment as a manufacturer in respect of the two last-mentioned premises.

After the tobacco is processed at the St. Clair Street premises and packed in hogsheads, it is transferred either to the Patteson Avenue premises or to the Colborne Street premises. There the tobacco is housed or stored for periods of from five months to two or more years, and in the ordinary course its value is enhanced thereby. The appellant is the owner of the Patteson Avenue premises, and is lessee of the Colborne Street premises, and it is the sole occupant of both.

The County Judge has found that the appellant occupies or uses the premises on Patteson Avenue and Colborne Street for the purpose of its business, and that business he has found to be the business of a manufacturer. Subs. 1 of s. 8 of The Assessment Act provides that every person occupying or using land for the purpose of any business as mentioned or described in the section shall be assessed for a sum to be called "business assessment", to be computed by reference to the assessed value of the land so occupied or used by him. The subsection then proceeds to mention or to describe a variety of classes of business in numerous sub-clauses, each of which is distinguished by a letter. As to each class, provision is made for an assessment at a certain rate per centum of the assessed value of the land occupied or used for the purpose of his business by the person carrying on a business that falls within the class. Clause (e) provides for the assessment of "every person carrying on the business of a manufacturer for a sum equal to sixty per centum of the assessed value." The appellant's business being that of a manufacturer, and the lands on Patteson Avenue and on Colborne Street being occupied or used by the appellant for the purpose of its business, all requirements are fulfilled to make the appellant liable to business assessment at the per centum rate provided in clause (e). It is not necessary that manufacturing should be carried on upon these particular premises. The requirement is that they shall be used or occupied for the purpose of his business by one who carries on the business of a manufacturer.

This construction of the statute is long settled by such cases as *Re Hiram Walker & Sons Limited and Town of Walkerville* (1917), 40 O.L.R. 154, 38 D.L.R. 758; *Re Studebaker Corporation of Canada Limited and City of Windsor* (1919), 46 O.L.R. 78, 49 D.L.R. 326; followed recently in *Re The City of Toronto and Belding Corticelli Ltd.*, [1939] O.R. 409, [1939] 3 D.L.R. 73, and *Kelvinator of Canada Limited v. City of London*, [1942] O.W.N. 485.

The appellant relies upon *Re The City of Chatham and The Canadian Leaf Tobacco Co.*, [1938] O.W.N. 265, [1938] 3 D.L.R. 430, where a different conclusion was reached in regard to appellant's business assessment in respect of lands used or occupied in a similar way. The appellant says, in the first place, that the parties being the same, the matter is *res judicata*, the subject-matter being the same. The subject-matter, however, is not the same. Not only are the lands not identical in the two cases, although the business purpose of occupation may have been the same, but the appeals are from assessments in different years. The language of Lord Carson in *Broken Hill Proprietary Company, Limited v. Municipal Council of Broken Hill*, [1926] A.C. 94 at 100, where a similar contention was made, is in point:

"There is, however, no substance in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question—namely, the valuation for a different year and the liability for that year. It is not *eadem questio*, and therefore the principle of *res judicata* cannot apply."

The appellant further contends that the decision of 1938 being a judgment of this Court of Appeal on facts indistinguishable for the present purpose from the facts of the present case, we are bound to follow the decision of 1938, the more particularly because that decision is expressly founded upon the judgment of the Supreme Court of Canada in *Loblaw Groceterias Co. Limited v. The City of Toronto*, [1936] S.C.R. 249, [1936] 3 D.L.R. 346.

Beyond question, we should be bound by the judgment of the Supreme Court of Canada, if it is in point, and we should regard with great respect the former judgment of this Court upon this same question, even if it is in conflict with other decisions of the Court. The *Loblaw* case is, however, not in point. The business in question in that case was not the business of a manu-

facturer, but was the business of selling or distributing goods, wares and merchandise to a chain of more than five retail stores or shops in Ontario, directly or indirectly owned, controlled or operated by the same person, and came within what is now clause (d) of s. 8(1). By clause (d), the lands occupied or used for certain specifically described purposes, in carrying on a business of the class described as above, are liable to business assessment on a percentage basis that differs from the percentage basis applicable to the other lands occupied or used by the same person for the same business. Clause (d) provides that the business assessment of a person carrying on a business such as the clause describes, in respect of land occupied or used by him in such business for distribution premises, storage or warehouse for such goods, wares and merchandise, or for an office used in connection with the said business, is to be for a sum equal to 75 per cent. of the assessed value of the land so occupied or used.

The business in question in the *Loblaw* case was such a business as clause (d) describes. The company assessed in that case occupied or used, for the purposes of its business, separate parcels of land, one parcel being used for purposes coming within clause (d), as abovementioned—then clause (cc), first enacted by c. 2, s. 2 of the statutes of 1933—and another parcel across the road from the first-mentioned parcel, which was used as a garage, and for the housing of motor vehicles. The company was assessed for business assessment on the same basis in respect of both parcels as coming under what is now clause (d). The company did not appeal against its business assessment in respect of the first-mentioned parcel, conceding that it was properly assessed on a basis of 75 per centum, but it did appeal against its business assessment in respect of the other parcel. The Supreme Court of Canada held “that the occupation or use of the particular land subjected to this special assessment must be looked at”, and, having regard to the particular occupation or use of the parcel in respect of which the business assessment in question on the appeal was made, it was held that it did not come within the description of the present clause (d).

It is this judgment of the Supreme Court of Canada, specifically based upon the construction of what is now clause (d), that the Court of Appeal, in the judgment in 1938, in *Re The City of Chatham and The Canadian Leaf Tobacco Co., supra*, deemed to be conclusive on the point that was raised before it under what

is now clause (e). Clause (d), however, had no application to a business of the class that was in question in the 1938 case, and it has no application to the business in question in the present case. There is nothing in clause (e), which governs in the case of a manufacturer, that warrants a construction by which the occupation or use of one particular parcel of the land employed in carrying on the business of a manufacturer will distinguish it, for purposes of business assessment, from any other parcel used or occupied for the purposes of the same business. Wherever in s. 8(1) of The Assessment Act the Legislature intended that, for the purpose of business assessment, one part of the land used or occupied for the purpose of carrying on a business should be regarded differently from other land used or occupied in the same business, by reason of the particular use to which it is put, it has said so expressly, as in clauses (a), (b) and (g). Except where a difference is made either by express exception, as in clauses (a) and (b), or by specific provision as in clause (d), the terms of s. 8(1) are such that the person carrying on a business, for which he occupies or uses land, is to be assessed, for business assessment, for a sum arrived at by applying one and the same per centum rate to the assessed value of all the land occupied or used for the purpose of the business, and the particular character of the use made of any part of such land is not to be regarded so long as it is occupied or used for the purpose of the business carried on by the person assessed. The class mentioned or described in the clause into which that business falls determines what that single per centum rate should be.

In my opinion, for the reasons I have stated, we should not follow the decision in the case between these parties in 1938, but should apply the principle of the *Hiram Walker* case and of the *Studebaker* case, and other cases which I have first cited, and we should dismiss this appeal, with costs.

Appeal dismissed with costs.

*Solicitors for the appellant: Kerr, McNevin, Gee & O'Connor,
Chatham.*

Solicitor for the respondent: Alton L. Hanna, Chatham.

[MACKAY J.]

Pook et al. v. Ernesttown School Trustees.

Schools—Liability of Board—Upkeep of Grounds—Permitting Accumulation of Debris—Liability for Consequent Injury—The Public Schools Act, R.S.O. 1937, c. 357, ss. 89(e), 103(g).

If a public school board permits an accumulation of debris, such as stones, brick-bats, etc., to remain upon the school playground, it has failed to perform the duty imposed upon it by ss. 89(e) and 103(g) of The Public Schools Act, R.S.O. 1937, c. 357, and by departmental regulations, and will be liable in damages if a child lawfully playing upon the playground is injured in consequence of such accumulation. *Ching v. Surrey County Council*, [1910] 1 K.B. 736, applied; *Butterworth et al. v. The Collegiate Institute Board of Ottawa*, [1940] O.W.N. 332, distinguished.

AN action for damages. The facts are fully stated in the reasons for judgment.

14th, 15th and 16th February 1944. The action was tried by MACKAY J. without a jury at Napanee.

J. M. Simpson, K.C., for the plaintiffs.

Alastair Macdonald, for the defendants.

27th July 1944. MACKAY J.:—This is an action for damages for injuries sustained on the 14th day of April 1943, by the infant plaintiff, who, while playing or scuffling with other school boys, was pushed or fell on to loose rocks, brick-bats and other rubble lying upon the school grounds, which injury caused a spiral fracture of the tibia in the lower third and a fracture of the fibula in the upper third of his right leg. The infant plaintiff was at the time of the accident fourteen years of age.

Walter J. Pook, father of the infant, sues on behalf of Jack Pook, and the mother of the said infant sues in her own behalf. The defendants are the Board of Public School Trustees of School Section 13 in the Township of Ernesttown in the County of Lennox and Addington.

The accident occurred during the regular school sessions while the said infant, in company with other children, was exercising on the school grounds during a period of recreation and while he was lawfully and properly playing in the school grounds.

There was, at the time of the trial, 14th February 1944, good bony union of the fractures, and the alignment and apposition of the bones was excellent. Owing to difficulty experienced in keeping the bones in alignment and apposition, it was necessary to plate the fracture.

On 12th November 1943, while playing with a kite, the infant plaintiff ran a stick of wood into the scar tissue at the site of the wound. This caused a condition of sepsis which made it necessary to remove the plate, which operation was performed on 6th December 1943. As late as 14th February 1944 there was a discharge of sepsis where the stick entered the scar tissue. This condition has passed from the stage of pus to that of serum, and the prognosis of the medical witnesses is that the condition should clear up in four to six weeks from February 1944.

I find as a fact that the said infant, Jack Pook, was playing or scuffling with one Jack Smith, who was a school boy of about the same age; that Jack Smith got hold of Jack Pook, stuck his foot behind Pook and pushed him over; that Jack Smith did not fall on top of Jack Pook but recovered when he, Jack Smith, had one knee on the ground and the other leg over Jack Pook, and that none of Smith's weight fell on Pook. I further find that there were brick-bats and stones of considerable size, such as Ex. 6, lying around the school grounds and especially at the place where Jack Pook sustained the injury; that those stones and brick-bats had been there for some considerable time. I also find that the infant's injury was caused by the infant falling on these stones and brick-bats, or by his leg becoming caught between these stones.

The general regulations issued by the Department of Education for the Province of Ontario, 1942, are filed as Ex. 2 in this action. Regulation 2(1) (d) is as follows: "The grounds should be beautified with trees and shrubs and should be kept free from long grass, weeds and rubbish."

In addition to these regulations there are statutory rules. The Public Schools Act, R.S.O. 1937, c. 357, s. 89(e), defines among other things the duties of the Board of Trustees "to acquire or rent school sites and premises, and to build, repair, furnish, and keep in order the school-houses, furniture, fences and all other school property, and to keep the wells, closets and premises in a proper sanitary condition."

Then s. 103(g): "to give assiduous attention to the health and comfort of the pupils, to the cleanliness, temperature and ventilation of the school-house, to the care of all maps, apparatus and other school property, to the preservation of shade trees and the orderly arrangement and neat appearance of the play-grounds."

Notwithstanding the directions given by the statute and by the regulations, not one witness on behalf of the defendants has been able to tell the Court of one single act done in the way of clearing stones, brick-bats, rubble, etc., from the school grounds in order to comply with the requirements of the law.

In *Ching v. Surrey County Council*, [1910] 1 K.B. 736, a little boy nine years of age was playing in a shed attached to the school, which shed was part of the playground. The floor was of tar paving, and some holes had been worn between two, three or four inches deep and as large as a boy's cap, as it was described in the evidence. This boy fell in the hole and broke his arm. The caretaker knew that there were two holes in the floor of the shed, and he filled them daily with sand or fine gravel to keep them filled. The headmaster became aware of the holes before the accident, but did not report them because he did not think they were dangerous as long as the caretaker kept them filled.

At the trial, Bucknill J. presiding, the jury found that the child was injured owing to the negligence of the defendants, and judgment was given for the plaintiffs. The judgment was appealed. The headnote reads: "Held, affirming the judgment of Bucknill J., that the action was maintainable on the ground that, by the Education Act, 1902, a statutory duty of keeping the school premises in a state of repair was imposed upon the defendants, and they were responsible for neglect of that duty by those who actually managed the school."

In Halsbury's Laws of England, 2nd ed., vol. 12, p. 41, para. 86, the law is thus set forth: "This provision and the obligation of the local education authority to maintain a public elementary school provided by them involve a duty to keep the schoolhouse of any such school in repair, and the authority are thereby made liable for injuries caused to a child attending the school by the defective condition of the playground."

The Earl of Halsbury, in *Ching v. Surrey County Council*, *supra*, at p. 741 says: "With regard to the question of fact, it is enough, I think, to say that it seems to me impossible for any one seriously to contend, upon the evidence with regard to the nature of this hole in the pavement, that it was reasonable to leave such a hole in a place where boys were expected to play and run, so that the accident might obviously occur which has occurred in this case." And further, at p. 742: ". . . .

the words 'maintain and keep efficient,' as applied to a school, must necessarily include, not only what has been described as the 'scholastic system' which is to be enforced, but also the place where the duty is to be performed by those who are under the main duty of keeping the school efficient for the scholars", and on p. 743, Fletcher Moulton L.J. says: ". . . there was a clear statutory duty; and, there being neglect of that statutory duty, a boy, who was a member of the public, was through that neglect injured. It was argued that the school children, for whom this playground was primarily intended, are for some reason excluded from the rights which ordinary members of the public would have in such a case. I can see no ground for that suggestion. They are not merely permitted or invited to come to the school, but directed to do so, and I think that, as members of the public, if they are injured by neglect of a statutory duty with regard to a place where they are expected to play, they are entitled to make those upon whom the statute has imposed the duty responsible for injuries sustained by them through breach of such duty."

It is clear from the evidence that there was an accumulation of refuse, stones, brick-bats, etc., on the playgrounds. S. 89 clearly imposes a duty on the Board to refrain from piling rubbish or debris in the school-yard. I cannot see how this differs from the breach of any other statute. The school board has no more right to flout The Public Schools Act or any other Act than an individual would have to disregard a provision of The Highway Traffic Act. The statute is mandatory, and being commanded by the statute is being commanded by His Majesty the King, and cannot be disregarded any more than the children can disregard the statute which compels them to go to school, no matter what the school is like or how it is kept up. The children are compelled by law to attend school, and if they do not attend there are means to make them do so, by inflicting a punishment for not so attending.

It was argued by counsel for the defence that the case at bar was governed by the decision in *Butterworth et al. v. The Collegiate Institute Board of Ottawa*, [1940] O.W.N. 332, [1940] 3 D.L.R. 466. I am not of that opinion. In the case at bar we are dealing with a hidden danger, having regard to the mental development and capacity of children of tender years.

I am of opinion that there is a direct causal connection between the injury that the infant plaintiff suffered and the negligence of the school board.

The following additional cases have been reviewed: *Scoffield et al. v. Public School Board of Section No. 20 North York*, [1942] O.W.N. 458; *The Winnipeg Electric Railway Company v. Wald* (1909), 41 S.C.R. 431; *Corby v. Foster* (1913), 29 O.L.R. 83, 13 D.L.R. 664; *Steven v. The Robert Simpson Co. Ltd.*, [1940] O.W.N. 415, [1940] 4 D.L.R. 504; *Ramsden v. Hamilton Board of Education*, [1942] 1 D.L.R. 770; *Gibbs v. Barking Corporation*, [1936] 1 All E.R. 115, and *Koch and Koch v. Stone Farm School District*, [1940] 1 W.W.R. 441, [1940] 2 D.L.R. 602.

The following disbursements were made:

Dr. H. C. Mabee	\$153.00
Dr. Boucher	170.00
Hotel Dieu	123.30
Hotel Dieu	26.00
Ambulance	17.00
Special Foods	30.00
<hr/>	
Total	\$519.30

For pain and suffering, remembering the prolonged sinus and loss of schooling, I am of opinion that the sum of \$350.00 is just and reasonable.

There should be judgment for the plaintiff for \$869.30 and costs.

The claim by the infant's mother, the plaintiff Alice Pook, for personal services, is not allowed.

Judgment accordingly.

Solicitor for the plaintiffs: J. M. Simpson, Napanee.

Solicitors for the defendants: Clark, Robertson, Macdonald & Connolly, Ottawa.

[McFARLAND J.]

Fetherston v. Neilson and King Edward Hotel (Toronto) Limited.

Negligence—Dangerous Premises—Duty to Invitee—Column specially Installed for Lighting—Liability of Third Person Bringing about Actual Damage.

While the plaintiff was playing as a member of the orchestra at a dance in a hotel, his violin was damaged by the fall of a pillar which had been erected by the hotel company for lighting purposes. The trial judge found as a fact that the pillar had been pulled or pushed over by N., one of the dancers, and he further found that the pillar was not adequately constructed, that the room was insufficiently lighted, and that there was serious overcrowding.

Held, both N. and the hotel company were liable in damages. *Le Lievre and Dennes v. Gould*, [1893] 1 Q.B. 491, quoted. As to the hotel company, its vicarious liability rested upon the inherent danger resulting from the erection of the pillar, according to the principle laid down in *The City of St. John v. Donald*, [1926] S.C.R. 371 at 383, and also upon the inadequate lighting and the overcrowding. The negligence should be apportioned 70 per cent. against N. and 30 per cent. against the hotel company.

AN action for damages. The facts are fully stated in the reasons for judgment.

8th and 9th June 1944. The action was tried by MCFARLAND J. without a jury at Toronto.

R. N. Starr, for the plaintiff.

E. G. Black, K.C., for the defendant Neilson.

W. Judson and L. Guolla, for the defendant King Edward Hotel (Toronto) Limited.

1st August 1944. MCFARLAND J.:—The plaintiff sues for damages to a violin owned by him. In the early morning of 1st January 1944, the plaintiff was playing the said violin as a member of the orchestra which was playing for dancing at a New Year's Eve party given at the defendant company's hotel, in a room in its premises on King Street East, Toronto. The party was sponsored by the defendant company and an admission fee was charged. The damage was caused by the fall of a pillar which had been erected by the hotel on the platform on which the orchestra was playing, for the purpose of supplying light. The evidence showed that the said pillar had been pushed or pulled over by the defendant Neilson, and had fallen on the plaintiff's violin, causing the injuries complained of. The evidence was conflicting as to whether the defendant Neilson had stepped on to the platform, and placed his arm around the pillar, thereby causing it to fall over, or whether he had pushed it over while dancing on the floor of the room. It is claimed that

the hotel company was negligent in that the pillar was insufficiently fastened to the platform, and further, that the conditions under which the dance was being conducted constituted negligence on the part of the hotel, by reason of the fact that the room in which dancing took place was grossly overcrowded, and that the lighting of the room was entirely insufficient.

As to the alleged negligence of the defendant Neilson, it is admitted that he was responsible for the overthrow of the pillar. He and several of his witnesses deny that he ever stepped on the platform or that he ever had his arm around the pillar. He and his witnesses claim that he was dancing in the neighbourhood of the pillar, and that he was pushed or jostled against the pillar by other dancers, thus causing its collapse.

It is claimed by the plaintiff that whether the pillar was pulled over by Neilson as the result of his being on the platform with his arm around it, or whether it was knocked over by the defendant Neilson bumping into it, Neilson is liable for the consequences. The plaintiff alleges that accidental injury is no defence, and that, indeed, accidental injury is the basis of most negligence actions, and quotes the judgment of Lord Esher M.R. in *Le Lievre and Dennes v. Gould*, [1893] 1 Q.B. 491, as follows:

"If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." The plaintiff also quotes *McAlister (or Donoghue) v. Stevenson*, [1932] A.C. 562.

As to the liability of the hotel, it is conceded in its argument that the plaintiff was an invitee, and that it is governed by the law laid down in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274.

As to the evidence of the actual occurrence, we have that of a Mr. Snider, a member of the orchestra, Miss Henry, the vocalist, who was on the platform at the time, and a Mr. McLagan, another dancer, all of whom swore that they saw a man on the platform. The head-waiter, Moshier, swore that after the fall of the pillar he followed the defendant Neilson into the crowd, where he (Neilson) was trying to hide; that at the time Neilson denied having caused the accident. Neilson and his dancing partner both admitted in evidence that they knew that they had caused the column to fall, but that they danced away into the crowd. Three members of the party to which

Neilson belonged, and which occupied a table in the vicinity, say that Neilson was jostled against the column. This seems to be contradicted by the manner in which the column fell. It is suggested that if Neilson had been jostled from the floor, the column would have fallen to the back of the platform; instead, it fell across the front of the platform, which is entirely consistent with the evidence of Snider, Miss Henry and McLagan, and entirely consistent with the allegation that Neilson was on the platform with his arm around the column, and thus pulled it down. As has been said above, Neilson admits that he was the cause of the accident, and the question is, how did he cause it? Snider says he saw some one step on the platform and put his arm around the pillar; Miss Henry swore some one had his arm around the pillar for some time; McLagan was dancing and saw some one with his arm around the pillar at or about the time the pillar fell.

On the evidence as to the actual occurrence, I come to the conclusion that Neilson was, as a matter of fact, on the platform with his arm around the pillar, and that his position, and the pressure exerted by him on the pillar, caused the accident.

As to the alleged liability of the hotel company, it claims that the lighting fixture which caused the damage consisted of a base or pediment into which was set a fluted column, and that it was no more than a large reading-lamp, giving its light by indirect illumination. As against the latter statement there is definite evidence that the pillar was long enough to reach to the ceiling and was circular, with a very substantial circumference and a base smaller than the top, and that it weighed in the neighbourhood of 75 pounds, which would hardly make it comparable to the ordinary reading-lamp. It was purchased ready-made from a lumber company, was wired for electricity by the hotel, and was fastened to the platform by means of screws through its base. The fluted column was inset in the base, and was glued in and also fastened with nails. Evidence was given by one witness that it was of the usual pattern and had been correctly installed. On the other hand, there was considerable evidence that the fastening of the pillar to the base was quite flimsy; that the whole fixture was entirely unsuited for use in a crowded dance-hall, where it was quite certain that the dancers would come into contact with it. I am of the opinion that this allega-

tion on the part of the plaintiff and of the defendant Neilson is well-founded. The law on the question, as cited by the defendant Neilson, is set out in *The City of St. John v. Donald*, [1926] S.C.R. 371, [1926] 2 D.L.R. 185, by Anglin C.J.C. at p. 383:—

“His vicarious responsibility [*i.e.*, that of the employee of an independent contractor] arises, however, where the danger of injurious consequences to others from the work ordered to be done is so inherent in it that to any reasonably well-informed person who reflects upon its nature the likelihood of such consequences ensuing, unless precautions are taken to avoid them, should be obvious, so that were the employer doing the work himself his duty to take such precautions would be indisputable. That duty imposed by law he cannot delegate to another, be he agent, servant or contractor, so as to escape liability for the consequence of failure to discharge it.”

It would seem clear also that, in the absence of evidence as to the specifications given to the makers of the pillars, or care on the part of the defendant company in selecting the type of pillar, there was an omission to perform a duty cast upon the defendant company.

There are also the two matters of lighting and crowding, which were mentioned above. I am of the opinion that the defendant hotel was negligent in the circumstances, in that the lighting of the room in which the dancing took place was utterly inadequate to the occasion, and that the defendant hotel had sold tickets to, and admitted, many more persons than the number which could possibly be accommodated, according to its size. There was undisputed evidence that it was quite impossible for more than a small proportion of the persons admitted to dance at the same time, and that during the dancing, crowding and jostling were very great indeed.

In view of these facts I am of the opinion that there was negligence on the part of both defendants, and the degree to which they are respectively found to be at fault or negligent under The Negligence Act, R.S.O. 1937, c. 115, s. 2(1), will be dealt with later.

Coming to the matter of damages, I find great difficulty in the assessment of them. The plaintiff claims \$1,100 as the value of the instrument, for which he says he paid \$250 cash, and

gave to the vendor a violin which had cost him (the plaintiff) \$850. It was claimed that the violin which was injured was a very old one and very valuable on account of having been manufactured by an Italian violin-maker named Rocca. The evidence seems to me to establish quite clearly that the instrument was not, as a matter of fact, made by Rocca, but may have been made by another Italian not having the same reputation. Apart from its actual origin, there is no doubt that the plaintiff found the violin after a long search, and that it exactly suited him as a musician, and assisted him in carrying out, to his entire satisfaction and that of others, including his employers, the work in which he was engaged. The plaintiff claims that he should be compensated, in addition to the actual value of the violin, for the damage which he suffers from the fact that it was peculiarly suited to his particular skill and taste, especially in the matter of tone. This was corroborated by the evidence of the three witnesses, Messrs. Milligan, Roberts and Kindness. The two former had played the violin. According to the evidence of the plaintiff, even if the violin were physically restored, he would never have the same confidence in it that he had before, and other witnesses of proved technical ability and experience supported him in that, and said, moreover, that the violin could never have the same tone which it had before the injury.

Witnesses for the defence gave evidence to the effect that the violin had been repaired at least twice before, and valued it at anywhere from \$50 to \$250, and the cost of the repairs was estimated at from \$25 to \$75. I may say quite frankly that, in my opinion, certain of the evidence given by so-called experts for the defence, notably that of the witness Otto, was pure nonsense. It should be noted that no evidence was produced by the plaintiff to substantiate his statement that the violin which he gave in part payment for the one in question was worth \$850, as he claimed.

The plaintiff claims in all the sum of \$1,500, being the amount of \$1,100 for the violin and \$400 for special damages arising out of the serious mental worry as to his musical future, which afflicted him as a result of the accident. I am of the opinion that the sum of \$750 in all would be reasonable to award the plaintiff, and there will be judgment for that amount, with costs. As to the allocation of the negligence between the two defend-

ants, I find that Neilson was 70 per cent. negligent and the hotel company 30 per cent. There will be judgment accordingly.

Judgment for \$750 and costs.

Solicitors for the plaintiff: Starr, Hall & Starr, Toronto.

Solicitor for the defendant Neilson: Harvey Obree, Toronto.

Solicitors for the defendant company: Daly, Thistle, Judson & McTaggart, Toronto.

[HOPE J.]

Donald et al. v. The Board of Education for the City of Hamilton et al.

Schools—Discipline—Rights of Boards and Teachers—Patriotic Exercises—Requiring Singing of National Anthem and Salute to Flag—Expulsion of Pupils for Non-compliance—The Public Schools Act, R.S.O. 1937, c. 357, ss. 1(i), 2, 7(1), 89, 103—The High Schools Act, R.S.O. 1937, c. 360, ss. 1(1)(l), 8(1), 24(m)—Regulations under The Department of Education Act, R.S.O. 1937, c. 356, s. 4(a), respecting Public and High Schools.

Under the relevant statutory provisions, and regulations having the force of statute, boards of education, and principals and teachers acting under their direction, have power to require all pupils in public and high schools to sing the national anthem, and to salute the flag, as part of the opening or closing exercises in the school, and to expel any pupil who refuses to comply with such order. It makes no difference if the refusal is based upon religious convictions. *West Virginia State Board of Education et al. v. Barnette et al.* (1943), 319 U.S. 624; *Minersville School District et al. v. Gobitis* (1940), 310 U.S. 586; *Ruman v. Board of Trustees of Lethbridge School District*, [1943] 3 W.W.R. 340, considered.

AN action for damages. The facts are fully stated in the reasons for judgment.

30th and 31st March 1944. The action was tried by HOPE J. without a jury at Hamilton.

J. L. Cohen, K.C. and W. Glen How, for the plaintiffs.

O. M. Walsh, K.C., for the defendants.

12th September 1944. HOPE J.:—The plaintiff, Robert Donald, who is the father of the two infant plaintiffs, is a vendor of postage stamps in the post office in the city of Hamilton, and is a resident of the said city. Hence, the infant plaintiffs, who were born on 27th August 1927 and 31st July 1931, respectively, and therefore sixteen and twelve years of age at the time of the trial, were entitled normally to attend the schools of the

said city prior to the commencement of this action, as provided by The Public Schools Act, R.S.O. 1937, c. 357, and The High Schools Act, R.S.O. 1937, c. 360.

The adult plaintiff and the older infant, both of whom testified, professed membership in a religious sect known as "Jehovah's Witnesses", the adult stating that he has been so for about thirty years and that his wife has been a member for her lifetime. The younger infant did not give evidence, and it may well be properly so, in the light of his tender years.

The infant plaintiffs were in attendance at one of the public schools of the city of Hamilton, and on 18th September 1940 the principal of the said school sent the children home with a letter (Ex. 10) addressed to their father, which read as follows:

"Mr. Robert Donald,
499 Charlton E.,
City.

"Dear Sir:

"Your children Robert, Grade VIII and Graham, Grade IV, have refused to take part in the opening exercises of this school. They refuse on religious principles to sing 'God Save The King', to repeat the pledge of allegiance, and to salute the Flag.

"Your children are hereby suspended from this school and a copy of this letter sent to the Board of Education.

"C. B. Joyce,
"Principal."

The older infant, Robert, after having received private tuition, later presented himself as a candidate for the entrance examinations, and was successful in passing, and in the autumn following his examinations he presented himself to one of the secondary schools of the city, was accepted as a pupil and attended the same until 2nd March 1942, at which time he was expelled, and the following letter (Ex. 5) was sent to his father by the principal of the school:

"March 2, 1942.

"Mr. Robert Donald,
499 Charlton Avenue East,
Hamilton, Ontario.

"Dear Sir:

"Inasmuch as your son Robert is not joining in the singing of the National Anthem or saluting the flag at the morning

exercises in his room, I must ask you to withdraw him from our school. I take this step with great reluctance as Robert otherwise has been most obedient and courteous, and a satisfactory student. In case of a change of attitude his teachers and I would be very pleased to have him return to us.

"Yours sincerely,

"A. W. Morris,

"Principal."

It is admitted (*vide* statement of admissions filed herein) that the schools in question are maintained by the defendant Board, and the infants were respectively expelled and excluded from their respective schools by their teachers, and not permitted to attend, pursuant to the decision of and instructions from the defendant Board, on the ground that the infants, contrary to the instructions of their respective teachers, refused in the opening and closing exercises of their respective classes to sing or repeat the national anthem with the other members of their classes, and also refused to salute the flag when required to do so by their teachers. It was further admitted that the infants had and have continued to refuse so to sing and salute as aforesaid on the objection of their father. It is also admitted that because of such refusal and its continuation, the defendant Board has continued to refuse to permit the children to attend the said schools.

It is also conceded that the version of the national anthem so required to be sung or repeated was that version authorized by the Department of Education for Ontario, and filed as part of Ex. 1 herein.

The plaintiffs in this action seek, first, a declaration of the Court that the infant plaintiffs are respectively entitled to attend the collegiate institute and the public school of the defendant Board; secondly, a *mandamus* directing the defendant Board to permit the attendance of the infants, and thirdly, damages covering the cost of private tuition which was given to the children during the period of their expulsion from the respective schools, and other expenses incidental thereto.

At the outset of the trial, counsel for the plaintiffs abandoned any claim against the defendants Morris and Joyce, who were the respective school principals, and agreed to a dismissal of the action against such defendants.

From the evidence it is clear that although the infant plaintiffs refused to so sing and so salute, they otherwise stood respectfully during such exercises, and in no way, other than the refusal to participate, showed any disrespect or caused any outward disturbance by their conduct. It is, however, equally clear from the evidence of the defendants' witnesses, which I accept, that the conduct of the pupils in so refusing to participate, as directed, had a serious and injurious influence on the moral tone or welfare of their respective classes.

The plaintiffs asserted that participation in the two patriotic exercises mentioned was contrary to their religious beliefs and in justification of their refusal to so participate, relied upon the provisions of s. 7(1) of The Public Schools Act, s. 8(1) of The High Schools Act, and Reg. 12(1)(a) of the Regulations of the High Schools and Collegiate Institutes, which respectively read as follows:—

“7. (1) No pupil in a public school shall be required to read or study in or from any religious book, or to join in any exercise of devotion or religion, objected to by his parent or guardian.”

“8. (1) The courses of study shall be those prescribed by the regulations.”

“12. (1)(a) Every High School shall be opened with the reading of the Scriptures and the repeating of the Lord’s Prayer, and shall be closed with the Lord’s Prayer or the prayers authorized by the Department of Education; but no pupil shall be required to take part in any religious exercises objected to by his parent or guardian.”

Much of the time of the trial was taken (probably unnecessarily) both in examination and cross-examination of the adult plaintiff and the older infant as to their religious beliefs which were offended by participation in the singing of the national anthem and the saluting of the flag, and also the bases of such beliefs.

At the outset I thought that this phase of the case might be of some particular significance, but I have now come to the contrary conclusion. However sincere and conscientious the particular or peculiar beliefs of the plaintiffs may be, I do not think they may or need be considered in connection with this action.

This same view was taken by the Supreme Court of the United States in the case of the *West Virginia State Board of*

Education et al. v. Barnette (1943), 319 U.S. 624, which was the latest "flag" case in that Court, wherein at p. 634 the Court states:

"Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held."

As I have already noted, the adult plaintiff had been a member of this sect for approximately thirty years. It was stated by him that each "witness" is himself his own interpreter of the words of the Bible, yet it was not until June 1940, according to the older infant's evidence, that he refused to participate in the patriotic exercises in question. He was prompted to so refuse, as he puts it in his evidence, not by reason of instructions given to him by his father or by his own interpretation of the Bible as a result of his father's instructions, but because he "had heard of other cases where children had taken that stand." It is true that he continues his statement by adding, "I saw it for myself in the Bible that it was right." It may be only a matter of coincidence that such action or belief of this pupil followed shortly after 29th May 1940, which was the date of issue of a copy of a publication entitled "Consolation" filed as Ex. 4 herein. This is a publication of the Watchtower Bible and Tract Society of the United States, which I understand is analogous to or allied with "Jehovah's Witnesses". The issue of 29th May 1940 dealt almost exclusively with the well-known American case of *Minersville School District et al. v. Gobitis* (1940), 310 U.S. 586. I cannot help but feel that the plaintiff's change of heart, resulting in a refusal to sing the national anthem and salute the flag, after having done so for a very considerable earlier period, sprang not from conscientious beliefs but as a result of knowledge of the American flag case. However, as I have intimated, I do not consider that I am concerned in this case with the question of the conscientiousness or otherwise of the belief, any more than that in the enforcement of certain laws within the Dominion a Court need be concerned with the religious beliefs and practices of a certain sect within the Dominion, members of which at times in public restrict their apparel to nature's garments, even as Adam and Eve in their days of innocence.

The problem which here confronts the Court is: Were the defendant and its teachers acting within the powers conferred

by statute and regulation in expelling the infant plaintiffs? Nor do I consider it necessary for the Court to discuss or consider the wisdom or efficacy of the compulsory singing of the national anthem and the saluting of the flag as a means of inculcating in the youth of our land a true sense of loyalty and patriotism. This is a problem of pedagogic psychology. It may be argued that a patriotism which is not from the heart, as a result of the teaching and understanding of our cherished institutions of democratic freedom and justice, but as a result of compulsory ceremonial exercises, is not to be desired, nevertheless I understand that it is commonly accepted in the education and training of the young that personal cleanliness, orderliness and neatness, for example, cannot be inculcated solely by expressions of ideals and desirability, but that such expressions require to be enforced by compulsory adherence to practices which formulate habits of cleanliness, orderliness and neatness.

Although it may be somewhat lengthy, I think I should here recite the pertinent provisions to be found in the respective statutes and regulations applicable hereto.

The Public Schools Act, R.S.O. 1937, c. 357, contains the following:

“1. (i) ‘Regulations’ shall mean regulations made under *The Department of Education Act.*”

2. The regulations, though not specially referred to, shall apply to any matter or thing in this Act contained, so far as the same are consistent with this Act.”

S. 7(1) has already been recited, *supra*.

“89. It shall be the duty of the boards of all public schools to see that the same are conducted according to this Act and the regulations”

“103. It shall be the duty of every teacher,—

“(a) to teach diligently and faithfully the subjects in the public school course of study as prescribed by the regulations, to maintain proper order and discipline in the school, to encourage the pupils in the pursuit of learning, and *to inculcate by precept and example respect for religion and the principles of Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues,*”

"(i) to suspend any pupil guilty of persistent truancy, or persistent opposition to authority, habitual neglect of duty . . . or conduct injurious to the moral tone of the school, and to notify the parent or guardian of the pupil and the board of such suspension, but the parent . . . of any pupil suspended may appeal against the action of the teacher to the board which shall have power to remove, confirm or modify such suspension." (The italics are mine).

The General Regulations for Public and Separate Schools, 1939, issued by the Department of Education contain the following provisions applicable herein:

"6. (2) Subject to the provisions of the Schools Acts and the Regulations, the authority of the Principal shall be supreme in all matters of organization, management, and discipline."

Under the heading "Duties of Pupils", Reg. 7 states:

"7. (2) He shall be neat and clean in his person and habits, diligent in his studies, kind and courteous to his fellow pupils, obedient and respectful to the teachers; and *he shall submit to such discipline as would be exercised by a kind, firm, and judicious parent.*"

Under the heading "The National Anthem in the Public and Separate Schools", Reg. 14 states:

"14. In every Public and Separate School, the singing of the National Anthem as authorized by the Department shall form part of the daily opening or closing exercises."

The above regulations are repeated in the 1942 General Regulations issued by the Department, but Reg. 14 there appears as Reg. 9(1).

In The High Schools Act, R.S.O. 1937, c. 360, the following provisions should be noted:

"1(1) (l) 'Regulations' shall mean regulations made by the Minister under *The Department of Education Act.*"

"24. It shall be the duty of every board and it shall have power,—

"(m) to expel, on the report of the principal, any pupil whose conduct may be deemed injurious to the welfare of the school"

In the departmental Regulations of the High Schools and Collegiate Institutes, 1941, are the following provisions, very similar to those already cited for the public schools:

"9. (1) The Principal of a High School or Collegiate Institute shall have supreme authority in all matters of discipline in his own school."

"9. (5) It shall be the duty of the Principal:

"(e) To suspend any pupil guilty of one or more of: . . . persistent opposition to authority, habitual neglect of duty . . . conduct injurious to the moral tone of the school; also to notify the parent or guardian of the pupil, and the Board, of such suspension."

"10. (1)(b) He [the pupil] shall be neat and clean in his person and his habits, diligent in his studies, kind and courteous to his fellow pupils, obedient and respectful to the teachers, and shall submit to such discipline as would be exercised by a kind, firm, and judicious parent."

"11. (3) In every High and Vocational School, the singing of the National Anthem as authorized by the Department shall form part of the daily opening or closing exercises."

The power to make regulations is found in The Department of Education Act, 1937, R.S.O., c. 356, s. 4(a):

"4. Subject to the provisions of any statute in that behalf the Minister, with the approval of the Lieutenant-Governor in Council, may make regulations,—

"(a) For the establishment, organization, government, courses of study, and examination of the schools, departments, school cadet corps, school gardens, supervised and outdoor playgrounds, institutes and institutions hereinbefore mentioned."

It should be noted that throughout these provisions of the statute and regulations cited, the word "shall" is repeatedly used, and further it should be noted that according to The Interpretation Act, R.S.O. 1937, c. 1, s. 32(zj) "‘Shall’ shall be construed as imperative."

It is also of importance, in my opinion, to note the accepted meaning of certain words employed in the above provisions as the same are defined on the authority of Murray’s New English Dictionary;

"Discipline" is defined as (1) "instruction imparted to disciples or scholars; teaching; learning; education; schooling. (3) Instruction having for its aim to form the pupil to proper conduct and action".

"Inculcate" means, on the same authority: "To endeavour to force (a thing) into or impress (it) on the mind of another by emphatic admonition, or by persistent repetition" and is further defined as "to urge on the mind, esp. as a principle, an opinion or a matter of belief", and lastly as "to teach forcibly".

"Precept" is on the same authority defined as: "An authoritative command to do some particular act; an order".

"Example" is defined as "Action or conduct that induces imitation", and Murray uses the illustration "example is far more than precept. It is instruction in action."

In the Shorter Oxford English Dictionary "example" is also defined as "a person or thing that illustrates a quality."

These definitions must be applied to the pertinent sections and regulations hereinbefore cited, and so applying them s. 103(a) of The Public Schools Act, as paraphrased, becomes:

"It shall be the duty of every teacher to teach forcibly by order or command, and action or conduct that induces imitation, the highest regard for loyalty, love of country", etc.

Similarly the problem under consideration herein was recently considered by Ives C.J.T.D., of the Supreme Court of Alberta, in *Ruman v. Board of Trustees of Lethbridge School District*, [1943] 3 W.W.R. 340, [1944] 1 D.L.R. 360. The fact that certain statutory changes have been effected in Alberta since that decision does not alter, however, the effect or applicability of the decision. Rather than imposing an imperative statutory direction, as in Ontario, the legislation of Alberta is permissive, giving to a board the power to require such patriotic exercises to be conducted at such times and places and in such manner as the board may from time to time direct: see s. 127(s) of the Alberta statute. The board having once exercised its discretion, and having so directed or required, then according to s. 155(1) of the Alberta statute it was provided that "In any school patriotic exercises shall be conducted at such times and places and in such manner as the Board may from time to time direct."

The effect of the Ontario legislation is, however, to impose an imperative obligation upon the teacher to forcibly teach patriotism by order or command and illustration. Moreover, as is to be noted, by Regulation 14 of the Public Schools Regulations

the singing of the national anthem "shall" form part of the opening or closing exercises of the school.

It was argued by the plaintiffs' counsel that this placed no obligation upon the teacher to compel all pupils to sing the national anthem, and that the phraseology used in the regulation might mean the singing of the national anthem by one person only, for example, the teacher, or a single pupil. However, I must conclude that in passing the regulation, which has the authority of a statute, it was intended that in referring to the singing of the national anthem it should be sung as is customary in all public gatherings or assemblages, namely, in unison.

The principle to be so applied in the interpretation of the regulation was expressed as follows by Lord Shaw of Dunfermline in the Privy Council in *Shannon Realties, Limited v. Ville de St. Michel*, [1924] A.C. 185 at 192, [1924] 1 D.L.R. 119:

"Where the words of a statute are clear they must, of course, be followed; but, in their Lordships' opinion, where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."

I can conceive of no more certain way of creating confusion, uncertainty and even friction amongst the pupils of a class as to their love of country, and duty to their country, than by permitting haphazard compliance with the singing of the national anthem at the whim of any particular pupil.

I am therefore of opinion that the respective teachers and principals concerned herein were not only exercising their proper and legal function, but were complying with an imperative duty imposed upon them by the statute and regulations.

As I have earlier intimated, the plaintiffs relied upon the exemption granted to them to refrain from participation in religious exercises by the statutory provisions and regulations hereinbefore recited, and at first blush one might be inclined to be moved by the argument advanced. There is, of course, no provision to be found in the regulations providing for the salute to the flag, as was found in the Alberta legislation, but I am of the opinion that the general imperative power given to the teacher to teach forcibly by command involving action, as well

as listening to instruction, thus involving prescribed exercises, gives to the teacher full power to prescribe the salute. The singing of the national anthem is, of course, specifically covered.

It should be noted that, in the regulations cited, it is obvious that these fall within the regulations pertaining to patriotic exercises and not with respect to religious exercises; for example, the regulation as to the singing of the national anthem states: "In every Public and Separate School".

In his argument counsel for the plaintiffs cited the American cases to which I have earlier referred. The *Minersville* case, *supra*, followed with consistency a number of earlier decisions in the United States of a somewhat similar nature. It is to be noted that in the *Minersville* case it was held (as expressed in the headnote) that "Religious convictions do not relieve the individual from obedience to an otherwise valid general law not aimed at the promotion or restriction of religious beliefs", or, to quote the precise words of the judgment at p. 594: "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. The necessity for this adjustment has again and again been recognized."

It was argued by the plaintiffs' counsel that the *Minersville* decision was supplanted and reversed by the later decision in *West Virginia State Board of Education v. Barnette*, *supra*. However, it must be noted in this latter case that in the opinion of the Court it is specifically stated at p. 634, as already cited herein:

"Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held . . . It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty."

The judgment in the *Barnette* case then proceeded to discuss the power to make the salute a legal duty on a constitutional basis, and found against possession of such power.

On my interpretation of the Ontario statutes and regulations, I am of the opinion that not only is the power vested in the teachers and principals, but that there is also an imperative duty imposed upon such teachers and principals to exercise such powers.

As to the general power of school teachers in the matter of discipline, the same has been dealt with in a number of English cases from time to time. In *Smith v. Martin and The Corporation of Kingston-Upon-Hull*, [1911] 2 K.B. 775, Farwell L.J., at p. 784, stated:

"In my opinion, the Education Acts are intended to provide for education in its truest and widest sense. Such education includes the inculcation of habits of order and obedience and courtesy; such habits are taught by giving orders, and if such orders are reasonable and proper under the circumstances of the case, they are within the scope of the teacher's authority, even although they are not confined to bidding the child to read or write, to sit down or to stand up in school, or the like."

Furthermore in *Hutt et al. v. The Governors of Haileybury College et al.* (1888), 4 T.L.R. 623 at 624, Field J., after citing the judgment of Cockburn C.J. in *Fitzgerald v. Northcote et al.* (1865), 4 F. & F. 656, 176 E.R. 734, states: ". . . the [school] master must take into consideration the interests, not only of the one boy, but those of the whole school."

I can find nothing herein which suggests that the teachers or principals were acting capriciously or with anything but the greatest *bona fides* in the discharge of their imperative duties, and as laid down in *Wood v. Prestwich* (1911), 104 L.T. 388, where a scheme provides for the expulsion of pupils for any adequate cause, to be judged by the master, the Court will not intervene if satisfied that the master acted *bona fide*.

There is not the slightest suggestion in the case, as submitted by the plaintiffs, that the Board or its officials acted in anything other than entire good faith. On the contrary, the evidence offered on behalf of the Board indicates clearly, in my opinion, that the teachers and principals acted with the greatest consideration and kindness, and fully as a wise parent would have acted in like circumstances. Hence, after very mature consideration, I have concluded that the plaintiffs' action must fail. Even were it to succeed, the proof of damages submitted

was far from satisfactory and some of the items I could not allow. Were I to assess damages, they would not exceed \$378, being the actual out-of-pocket expenses for tuition and the cost of school books which would otherwise have been supplied by the defendant.

In this action, and with particular reference to the assessment of any damages suffered, it might well be noted that by Order in Council of the Dominion of Canada, no. 2943, passed on 4th July 1940 (74 Can. Gaz. 62) amending the Defence of Canada Regulation 39C, the sect or organization known as "Jehovah's Witnesses" was declared illegal and that such Order in Council, so far as it affects such sect, was only rescinded on the 14th October 1943, by P.C. 8022 ([1943] 4 C.W.O.R. 127). In view of this, there may be some grave question as to the plaintiffs' rights to assert any claim to damages during the period of the said ban.

The action is therefore dismissed, and the costs must follow the event.

Action dismissed with costs.

Solicitor for the plaintiffs: J. L. Cohen, Toronto.

Solicitors for the defendants: Walsh & Evans, Hamilton.

[COURT OF APPEAL.]

**The Bayer Company Limited v. Farbenfabriken vorm Fried.
Bayer and Co. et al.**

Conflict of Laws—Jurisdiction of Courts—Service out of Ontario—Person within Ontario a Party—Declaration that Contract Cancelled—Rule 25(i).

The plaintiff sued two German companies, claiming, *inter alia*, a declaration that contracts between the plaintiff and the defendant companies had been cancelled or frustrated by the outbreak of war between Canada and Germany. The Secretary of State, as Custodian, was made a party defendant, but it was expressly said in the statement of claim that the plaintiff made no claim against him, and the prayer for relief stated the plaintiff's claims "against the defendant companies only". An order was made for the issue of a concurrent writ for service on the defendant companies out of Ontario, and permitting substitutional service.

Held, the defendant companies not having appeared, the Court had no jurisdiction to hear this branch of the action. It could not be brought within Rule 25(i), which provides for such service where a person out of Ontario is a necessary or proper party to an action properly brought against another person within Ontario, because, although the Custodian was duly served within Ontario, no relief whatever—even for costs—was claimed against him. The order for the issue of a concurrent writ was therefore made without jurisdiction, and the concurrent writ was ineffective to summon the defendant companies to appear, in so far as this cause of action was concerned.

As to the other branch of the action, in which the plaintiff sought a declaration that the contract had been terminated by breaches on the part of the defendant companies, the judgment of Urquhart J., *ante*, p. 305, was affirmed.

AN appeal by the plaintiff from the judgment of Urquhart J., *ante*, p. 305, [1944] 2 D.L.R. 616, dismissing the action.

12th and 13th June 1944. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and GILLANDERS JJ.A.

J. H. Rodd, K.C., for the plaintiff, appellant.

G. L. Fraser, K.C., for the defendant Custodian, respondent.

At the outset of the appellant's argument, the Court raised the question of jurisdiction with respect to the claim based upon frustration. At the conclusion of the appellant's argument on this point, and without calling on counsel for the respondent, judgment was delivered as follows:

13th June 1944. ROBERTSON C.J.O. (orally):—As to the cause of action set up in the statement of claim and first dealt with by the trial judge [*viz.*, that based upon alleged breaches of the contracts by the defendant companies], we see no reason to differ from the conclusion of the trial judge upon that matter. He was of opinion that so much had happened since the alleged breaches of the contract upon which the plaintiff relies for de-

stroying the contract, that the plaintiff must be taken to have elected not to cancel—not to consider the contract at an end. Whether the plaintiff had any right to do so or not—we are not deciding that. We see no reason to differ from the conclusion reached by the trial judge upon that matter.

Upon the other claim set up in the statement of claim, it is put in two ways in sub-paras. (b) and (c) of para. 1 of the prayer in the statement of claim—the alleged frustration of the contract, or the making it illegal to carry it out, or whatever one may call it. As to that matter, we think the issue so set up is not before the Court. We do not think it was within the jurisdiction of the Local Judge to make the order for issuing a concurrent writ for service out of Ontario. We do not think the concurrent writ had any validity in that respect, that is, in respect of these two causes of action. We do not think the service of the writ was of any validity so far as this part of the action is concerned; in short, it was ineffective to summon the company defendants to appear in this action in so far as these causes of action are concerned. That being the situation, it would be idle for us to hear argument upon those issues in the absence of the parties immediately concerned. We think that any order we might make attempting to dispose of these issues would be a nullity, and for the same reason in our opinion we think that the order of the trial judge in so far as it purported to decide and dispose of these issues is also a nullity.

The result is that the appeal is dismissed, and the action will stand dismissed, but the order of this Court may contain a statement that in so far as these two separate claims are concerned, that is, (b) and (c) of the prayer, they are dismissed merely on the ground that the Court had no jurisdiction to entertain them. The respondent will be entitled to the costs of this appeal.

Order accordingly.

11th September 1944. The plaintiff, appellant, moved to re-open the argument. The motion was heard by the same Court.

J. H. Rodd, K.C., for the motion: The point as to jurisdiction, having been raised by the Court, took us by surprise, and was not completely argued. The Custodian, in his pleadings, takes the position that these contracts are still in force, and we have

therefore a perfect claim against him, and, under Rule 67, we are entitled to join the other defendants. The companies are therefore proper parties to the action properly brought against the Custodian, and Rule 25(i) is applicable. The Rule does not require that the foreign defendant shall be a "necessary and proper" party, but only that he shall be "necessary or proper". I ask leave to amend the statement of claim, if necessary.

G. L. Fraser, K.C., for the Custodian, was not called on.

At the conclusion of the argument, THE COURT delivered judgment orally, dismissing the motion with costs, and intimating that written reasons would be delivered later.

22nd September 1944. The written reasons of the Court were delivered by

ROBERTSON C.J.O.:—This is a motion to re-open the argument of the appeal in this matter, in which we heard argument on 12th and 13th June last, and which we dismissed on terms, at the conclusion of the argument of counsel for the appellant. In our reasons for judgment given orally at that time, we held, with respect to the grounds of action set forth in clauses (b) and (c) of para. 1 in the prayer of the statement of claim, that the defendant companies were not before the Court, the proceedings that had been taken to bring them there being unwarranted and of no effect. It is in respect of this part of our judgment that it is sought, on this motion, to re-open the argument, counsel for the appellant saying that he had not been prepared to meet the objection taken to the proceedings, and had not, therefore, argued it fully.

We have, upon this motion, heard what counsel for the appellant had to advance in support of his contention that the proceedings were regular, and that the defendant companies having been served out of Ontario with notice of the writ of summons and with the statement of claim, and not having either entered an appearance or delivered a statement of defence, the plaintiff became entitled to proceed in the action as provided by the Rules of Practice in default of appearance or defence. In support of the validity of the proceeding by service out of Ontario, counsel relied upon the provision to be found in clause (i) of Rule 25 of the Rules of Practice and Procedure. The Rule provides as follows:

"25. (1) Service out of Ontario of a writ of summons or notice of writ may be allowed wherever—

"(i) A person out of Ontario is a necessary or proper party to an action properly brought against another person duly served within Ontario".

It was argued that the action was properly brought against the Secretary of State of Canada in his capacity of Custodian of Alien Enemy Property in Canada, and that the defendant companies are necessary or proper parties to the action so brought.

The relief claimed in the action is in the nature of a declaratory judgment. The Court may make binding declarations of right whether any consequential relief is, or could be, claimed or not. This is provided by clause (b) of s. 15 of The Judicature Act, R.S.O. 1937, c. 100. It is to be noted, however, that in the prayer of the statement of claim the plaintiff expressly restricts its claims to the defendant companies only. No claim whatever—not even for costs—is made against the Secretary of State. In these circumstances, it is, in our opinion, impossible to say that the action is one properly brought against the Secretary of State. Clause (i) of Rule 25, therefore, has no application. These matters were, in fact, all referred to, by either counsel or the Court, on the argument of the appeal, and they afford no ground for a rehearing.

Counsel supporting the motion asked that we grant leave to amend the statement of claim. It did not seem to us that this was a proper case for allowing an amendment. The purpose of the proposed amendment was to make regular, and to validate, proceedings that were invalid and had been taken without warrant, against persons beyond the jurisdiction, who had not appeared in the action. The plaintiff's rights (if any) in respect of the particular grounds of action with which we are presently concerned, have been preserved, by the order dismissing the appeal, and it would be less burdensome to begin a new action, if the plaintiff is advised to bring one, than to endeavour to put this action in proper order.

Reference was made, in the course of the former argument, to other possible objections to the appellant's proceedings against the defendant companies, but it was expressly upon the ground hereinbefore set forth that the appeal was dismissed. We intimated, on dismissing this motion, that it was our purpose to give

reasons in writing for so doing, and we also stated that the reasons so given might properly be regarded as a supplement to the reasons orally given in dismissing the appeal.

Motion dismissed with costs.

Solicitors for the plaintiff, appellant: Rodd, Wigle, Whiteside & Jasperson, Windsor.

Solicitor for the Secretary of State of Canada (Custodian), defendant, respondent: Gordon L. Fraser, Windsor.

[ROSE C.J.H.C.]

Re Allinson and the Court of Referees et al.

War Measures—Selective Service—Dismissal of Employees—Applicability of Regulations to Dominion Civil Service—Jurisdiction and Powers of Selective Service Officer and Court of Referees—Review by Court on certiorari—National Selective Service Civilian Regulations, 1943, as amended, ss. 200, 202, 202A, 203, 214.

The only jurisdiction of a court of referees, under part II of National Selective Service Civilian Regulations, is to hear appeals from orders, rulings, etc., of a selective service officer. If a selective service officer grants permission to serve a notice of separation from employment, under the regulations, there is a right of appeal to the court of referees from this direction, and there is likewise an appeal from his ruling upon an application by an employee of a "designated establishment" for review of his dismissal or suspension from employment. But if an employee, after having received notice of separation, and been suspended, in purported compliance with the regulations, does not apply to a selective service officer for review, but appeals directly to the court of referees against the suspension, there is no jurisdiction in the court of referees, and the appeal must be dismissed.

The court of referees is a tribunal whose proceedings are reviewable on *certiorari*, and if an applicant for *certiorari* shows facts which *prima facie* entitle him to have the proceedings reviewed, the order should be granted, unless the judge hearing the application is satisfied that no useful purpose can be served by such a review.

A MOTION for an order of *certiorari*. The facts are fully stated in the reasons for judgment.

25th April 1944. The motion was heard by ROSE C.J.H.C. in chambers at Toronto.

C. L. C. Allinson, applicant, in person.

J. E. Day, K.C., for the respondents.

28th September 1944. ROSE C.J.H.C.:—This is an originating notice under Rule 622 for *certiorari* to bring up the record of proceedings and the decision of the "court of referees" in the matter of an appeal by the applicant to that court (1) against a ruling by a selective service officer granting permis-

sion to the Civil Service Commission of Canada, Department of Labour, to terminate the employment of the applicant (or, as the regulations say, to give to the applicant "notice of separation" from his employment) and (2) against the applicant's suspension from duty.

The applicant was, as he says in his affidavit, an officer of His Majesty's Civil Service of Canada in the office of the "District Enforcement Officer" of the National Selective Service Civilian Regulations. On December 3, 1943, he was served by Mr. E. M. Dillon, the Ontario Regional Enforcement Officer, with a "notice of separation from employment", and was handed a letter written by Mr. Dillon, on the instructions as the letter said of those superior to Mr. Dillon in the organization, instructing the applicant to "take no further active part in the affairs" of the commission but to complete his report on a certain case, and informing him that a named person would on the next day assume his duties as District Enforcement Officer.

Leave to serve the notice of separation had been given by Mr. C. W. Boyer, the Selective Service Officer having jurisdiction in that behalf. The applicant appealed, as has been stated, against Mr. Boyer's "ruling" that the notice of separation might be given, and that appeal was dismissed by the court of referees. He also appealed against his suspension from duty, and that appeal also was dismissed. What he desires to bring before this Court are the papers relative to the two appeals.

The National Selective Service Civilian Regulations, established by Order in Council P.C. 246/1943 ([1943] 1 C.W.O.R. 196), passed under the authority of The War Measures Act, R.S.C. 1927, c. 206, and The National Resources Mobilization Act, 1940 (Dom.), c. 13, are complicated and in some respects difficult to understand. The object of them seems, in great part, to be to regulate the employment, dismissal, resignation, etc., of persons employed in industry, but by s. 200(1)(c) the word "employer" when used in part II of the regulations (which is the relevant part) means, unless the context otherwise requires, "any person having one or more persons in his employ and includes His Majesty in right of Canada, any person acting on behalf of an employer, and in the case of a corporation which is an employer, any officer of the corporation", and it seems to have been assumed, at least by the regional enforcement officer and the selective service officer at the Kitchener office, that the

regulations govern the relations between His Majesty and the applicant. S. 202(1) orders that "No employer shall lay off or terminate the employment of an employee without giving him in prescribed form in duplicate (a) seven days' notice of separation exclusive of the day on which the notice is given, or (b) such shorter notice as the Selective Service Officer allows", except in certain cases. By s. 202(4), "The Selective Service Officer may, in accordance with principles and directions set out in instructions given by the Minister, allow an employer to give less than seven days' notice under this section; and without limiting the generality of the foregoing, he may do so if he is satisfied" of one of several conditions not here relevant. By s. 202A(4)(a)* "Subject to the provisions of section 203 . . . no employer whose establishment has been classified as a 'designated establishment' may give notice of separation to an employee pursuant to Section 202 . . . without the permission in writing of a Selective Service Officer." The exception to this prohibition is found in s. 203(1) which provides that where an employer is of opinion that an employee is guilty of serious misconduct he may give him notice of separation pursuant to s. 202 and suspend him from duty forthwith, whereupon the employee shall have a certain right to apply to a selective service officer to review the suspension, about which right more will be said further on. By s. 202A(1) (a) "Every establishment which has been given an 'A' or 'B' labour priority rating pursuant to these regulations shall be classified as a 'designated establishment'", and one of the difficulties in this case is in ascertaining whether the "establishment" in which the applicant was employed had been given such a rating so as to bring into play the regulations relating to the dismissal of persons employed in "designated establishments", of which more anon.

The provisions for appeals are in s. 214. Where a selective service officer makes an order, direction or ruling under part II a person affected thereby may appeal to a court of referees. The court of referees is a body set up in the manner provided by The Unemployment Insurance Act, 1940 (Statutes of 1940 (Dom.),

* S. 202A of the regulations was enacted by P.C. 6625/1943 ([1943] 3 C.W.O.R. 562). Subs. 4 was revoked and re-enacted (after the dismissal here in question) by P.C. 3438/1944 ([1944] 2 C.W.O.R. 279). This amendment was after the dismissal in question in these proceedings, and the section is quoted in the judgment as it was when originally enacted.

c. 44, ss. 52 and 53). Apparently its only jurisdiction is to hear appeals from rulings, orders, etc., of the selective service officer. It has no power to hear appeals against an employer's service of "notice of separation" or against his suspension of the employee's employment or his termination of the employment. Those acts of the employer, when they are reviewable at all, are reviewable by a selective service officer, from whom, as already stated, lies the only appeal that does lie to the court of referees.

The regulations do not seem to restrict the right of an employer whose establishment is not a "designated establishment" to terminate the employment of an employee by seven days' notice of separation; and there does not appear to be any provision for review by anyone of the action of such an employer in terminating the employment of an employee by giving such a notice. The notice given in this case was a seven days' notice. It was given on December 3 and named December 10 as the last day on which Mr. Allinson was to work: see s. 202(1)(a). The provision that there is for review is contained in s. 203. When an employer whose establishment has been classified as a "designated establishment" professes to exercise his power to give an employee notice of separation for serious misconduct and suspends him from duty, the employee may, within seven days of the suspension, apply in writing to the selective service officer to review the suspension. If on reviewing the suspension the selective service officer finds that the employee was guilty of serious misconduct, the employee's employment shall be deemed to have terminated when he was suspended, but if, upon such review, the selective service officer finds that the employee was not guilty of serious misconduct, the employer shall reinstate the employee and the notice of separation shall be of no effect. By s. 214(1) an appeal appears to be given to a court of referees against an order, direction, or ruling made by the selective service officer upon such a review of the suspension. In this particular case Mr. Allinson contends that the notice of separation was one given for serious misconduct. I doubt whether that contention is correct. But whether it is correct or not, Mr. Allinson did not apply to a selective service officer for review of the action of the employer, his reason being, as stated in the grounds of appeal furnished to the court of referees, that there was no selective officer having jurisdiction to review the suspension. What he meant by there being no selective officer

having jurisdiction to review the suspension was that the selective service officer to whom normally the application for review would have been made was Mr. Boyer, and that Mr. Boyer was disqualified by reason of the fact that he had granted permission to serve the notice of separation. But the fact, if it be a fact, that there was no selective service officer who had jurisdiction to review the suspension did not confer jurisdiction upon the court of referees upon whom the regulations do not confer any such jurisdiction. Therefore the court of referees had no right to hear Mr. Allinson's appeal against the suspension from duty and was bound to dismiss that appeal. Obviously, then, nothing is to be gained by reviewing the conduct of the court of referees in connection with the hearing of that appeal and so there is not in connection with that appeal any reason for granting the application for an order of *certiorari*.

The question whether *certiorari* ought to be ordered in connection with the appeal to the court of referees against a ruling by Mr. Boyer granting permission to Civil Service Commission of Canada, Department of Labour, to terminate Mr. Allinson's employment is more complicated.

What Mr. Allinson desires, obviously, is a review by some tribunal of the allegation that his services had been unsatisfactory and of the further assertion, which he says is implied in his suspension from duty, that he had been guilty of serious misconduct. He would like, also, a ruling by this Court upon the question whether the provisions for dismissal contained in the National Selective Service Civilian Regulations can override s. 51 of The Civil Service Act, R.S.C. 1927, c. 22, as amended by the statutes of 1932, c. 40, s. 9. By that Act, power to suspend an officer, clerk or employee for misconduct or negligence in the performance of his duty is given to the head of a department or in his absence the deputy head, and the suggestion is that Mr. Allinson was such an officer, clerk, or employee as is referred to and that it was not competent by Order in Council to confer upon someone other than the head or deputy head of his department the power of suspension or dismissal that in this case was purported to be exercised by Mr. Dillon with the permission of Mr. Boyer. I suppose also that Mr. Allinson would welcome an opportunity of contending that upon the true interpretation of the regulations the provisions as to dismissal are restrictive rather than enabling—that they do not profess to confer upon

any employer a power of dismissal that he does not possess *aliunde*.

The permission that Mr. Boyer gave to the Civil Service Commission of Canada, Department of Labour, was given on a printed form called "Notice of separation from employment for designated establishments only". At the head of the form is a statement that the notice is not effective unless approved by a selective service officer. The form sets out the name and occupation of the employee and the name (Civil Service Comm. of Canada, Dept. of Labour) of the employer, and specifies as the reason for giving the notice "services unsatisfactory". It is signed by E. M. Dillon on behalf of the Commission and the Department of Labour, and Mr. Boyer as the selective service officer at Kitchener signs the grant of permission to terminate the employment. I have had much trouble in ascertaining whether the Civil Service Commission or the Department of Labour on whose behalf Mr. Dillon sought and obtained Mr. Boyer's authority to serve the notice was in fact an employer whose "establishment" had been classified as a "designated establishment". Reading the regulations as a whole, it seems strange that they should be applicable to persons employed in the civil service in any capacity such as that in which Mr. Allinson was employed, but the fact remains that the word "employer" is by the regulations made to include His Majesty in right of Canada; but as all the actions of Mr. Dillon and Mr. Boyer and apparently the action of the court of referees were founded upon the assumption that if Mr. Allinson's services were to be dispensed with the procedure to be followed was the procedure established by the regulations, I caused counsel to be asked to furnish information as to whether any "establishment" with which we are concerned had been given an "A" or "B" labour priority rating pursuant to the regulations (see s. 202A (1) (a)) or, without having been given such a rating, had by the director been classified as a "designated establishment". Mr. Day for the respondents has, pursuant to that request, furnished an affidavit by Mr. Walsh, the chief enforcement officer, and Mr. Allinson in a letter dated September 7, 1944, (sent to the Registrar of this Court and on file with the papers) has commented upon and criticized Mr. Walsh's statement. I need not refer in detail either to the statement or to the comments. Suffice it to say that before s. 202A of the regulations had been

passed the Minister, under others of the regulations and in purported exercise of a power to "classify in such manner as he deems expedient occupations, industries, firms or establishments according to essentiality in the prosecution of the war", had set up a priority rating under the heading "Professional Service", as follows:

"Group No."	Industry No.	Priority		Rating	
		Men	Women		
831	8311 Dominion Post Office	B		A	
832	8321 Other Dominion Government	B		A"	

Mr. Walsh expresses the opinion that by virtue of this action of the Minister, the employment of men in the Dominion Government service was given a "B" priority rating and accordingly that such service is an establishment which has been given the rating pursuant to the regulations. Mr. Allinson disputes this conclusion of Mr. Walsh's, but my opinion, on consideration, is that Mr. Walsh is right and that it follows that we are here concerned with an employer whose establishment is classified as a "designated establishment", and, therefore, that so far as the regulations go (I am saying nothing about the validity of the regulations) the procedure adopted by the officers at Kitchener was the appropriate procedure: the employer, for reasons other than serious misconduct on the part of the employee, applied to the selective service officer under s. 202A(4) (a) for permission in writing to give notice of separation; the selective service officer gave that permission; that giving of the permission was, I think, an order, direction or ruling under part II of the regulations; and Mr. Allinson as a person affected thereby had a right to appeal to the court of referees.

I am not sure what the effect would have been of a reversal by the court of referees of Mr. Boyer's "order, direction or ruling". There is nothing in the regulations to say, but it may well be, that such a reversal of Mr. Boyer's order, direction or ruling would have deprived the notice of separation of its effect—not by virtue of any express provisions of the regulations, because I do not think that s. 203 had any application—but simply because the employer had no right to serve the notice without Mr. Boyer's permission, and if the grant of the permission had been set aside, the notice would have become one given without authority. But whether or not the reversal of Mr. Boyer's order, direction or ruling would have been of much practical

advantage to Mr. Allinson, I think that he was entitled to have it reversed if for any reason the making of it was improper.

I think that the court of referees is the kind of tribunal to which *certiorari* will run, and I think that in the allegation (so far not denied) contained in para. 4 of the affidavit filed on this motion, and in some other paragraphs, there is, *prima facie*, sufficient to warrant the bringing of the proceedings of the court of referees up for review if any useful purpose will be served by such a review. The affidavit referred to says in effect that although Mr. Allinson had demanded a hearing by the court of review and although the court professed to hear him at considerable length, and although by s. 214(9) of the regulations a court of referees shall not decide an appeal until a reasonable opportunity has been given to the claimant to make any representations which he desires the court to consider in making its decision, this court of referees had in fact rendered its decision before Mr. Allinson was heard.

The question whether it ought to be said that no useful purpose can be served by the making of the order of *certiorari* has given me considerable difficulty. The powers of this Court when papers are so brought up are, of course, strictly limited; the jurisdiction of the Court on the return to the writ (or order) is quite different from the jurisdiction on an appeal; and I have not been able to satisfy myself that if the papers relating to Mr. Allinson's appeal to the court of referees against Mr. Boyer's ruling granting permission to terminate Mr. Allinson's employment are brought up this Court, even if it comes to the conclusion that Mr. Allinson's complaint against the conduct of the court of referees is well founded, will be in a position to hear argument of the questions either of fact or of law which he desires to argue. It may well be that Mr. Allinson was harshly or even unjustly treated, but that he has chosen the wrong method of trying to get redress for his grievances and that this Court would find itself unable to give any consideration to the question whether a grievance really exists. But after much consideration I have come to the conclusion that, although I entertain this doubt as to the practical utility of the order, I ought not to undertake at this time and upon this motion to decide whether the order that I am asked to make can be of practical utility, but that I ought on the contrary to cause the papers to be brought up and ought to leave all questions as to

what is to be done or can be done with the case to be decided by the judge presiding on the return. Therefore, while the motion in so far as it relates to the appeal against the applicant's suspension from duty must be dismissed, there will be an order of *certiorari* directed to the court of referees and the other persons named in the originating notice of motion and each of them requiring them and each of them to send to the Registrar's office at Osgoode Hall, Toronto, forthwith, the record of proceedings and decision of the court of referees with all things touching the same as fully and entirely as they remain in their or his custody, together with this order, that this Court may further cause to be done thereupon what it shall see fit to be done (see form No. 82 of the Rules of Practice).

There will be no order as to costs.

Order accordingly.

Solicitors for the respondents: Day, Ferguson, Wilson & Kelly, Toronto.

[GREENE J.]

Dubensky and Chumack v. Labadie.

Sale of Land—Vendor's Inability to Complete—Return of Deposit—Interest—Damages—Good Faith—One of Two Joint Tenants Accepting Offer to Purchase.

The rule, first laid down in *Flureau v. Thornhill* (1776), 2 Wm. Bl. 1077, and affirmed in *Bain et al. v. Fothergill et al.* (1874), L.R. 7 H.L. 158, that if a vendor, without fraud, is incapable of making title, the proposed purchaser is not entitled to damages for the loss of his bargain, is subject to exceptions. The rule does not apply where the non-performance arises, not from a difficulty as to title, but from the fact of the vendor not having first obtained title himself, or, *a fortiori*, where the failure to make title arises, not from the vendor's inability, but from his unwillingness, on the ground of expense or otherwise, to remedy the defect. *Engell v. Fitch et al.* (1868), L.R. 3 Q.B. 314; Dart on Vendors and Purchasers, 8th ed., pp. 846, 848, applied. Further, where a vendor has sold land to which he has no title, honestly believing that he can acquire the outstanding title, his conduct has been held to be reckless and unreasonable, disentitling him to rescind. *In re Des Reaux and Setchfield's Contract*, [1926] Ch. 178; *Lavine v. Independent Builders Ltd.*, [1932] O.R. 669, applied.

Where a contract for the sale of land provides that if the sale falls through because of a defect in title which the vendor is unable to remove, the deposit shall be returned to the purchaser without interest, and the vendor seeks to avail himself of this provision, the burden is on him to show good faith. If, instead of this, the evidence rather indicates bad faith on his part, the purchaser will be entitled, not only to interest, but also to damages.

Where a deposit on a proposed sale of land is properly paid to the vendor's agent, the purchaser's action to recover it, if the sale falls through, must be brought against the vendor, even if the money has not actually come into his hands. Dart, *op. cit.*, p. 842, approved.

AN action for damages and other relief. The facts are fully stated in the reasons for judgment.

25th and 26th April 1944. The action was tried by GREENE J. without a jury at Windsor.

29th September 1944. GREENE J.:—The plaintiff Helen Chumack through her agent and co-plaintiff Dubensky executed an offer in writing to purchase certain lands in the City of Windsor from the defendant for the sum of \$9,000, which offer was accepted by the defendant Labadie.

The lands in fact were owned by Labadie and his wife as joint tenants. The defendant refused to complete on two grounds, namely, that there was no valid offer to purchase and that his wife had not authorized a sale and would not join in the conveyance. The offer was originally typed "I, T. Dubensky, hereby agree etc.,," but in both copies of the offer and acceptance produced, one from the custody of the plaintiffs and one from the custody of the defendant, the name T. Dubensky was struck out and the words Helen Chumack were written in. The offer was signed at the bottom "T. Dubensky" and the acceptance underneath was signed by the defendant. Labadie admitted on examination for discovery that the document was in that form when signed by him. Dubensky signed as agent for Helen Chumack although not so describing himself. Dubensky is not a necessary party to the action and counsel for the plaintiffs at the trial asked that the action be dismissed in so far as he is concerned.

In my opinion there was an offer to purchase by Helen Chumack and an acceptance by the defendant.

In addition to pleading no offer and acceptance, the defendant pleaded that at the time of accepting the offer he stated that he was only a half-owner and that his acceptance was conditional on his wife's consent being obtained. The evidence did not support this plea.

The contract contained the usual clause that if the purchaser made "any valid objection to the title which the Vendor shall be unable or unwilling to remove, and which purchaser will not waive, this agreement shall be null and void and the deposit money returned to the purchaser without interest."

The real question at the trial was whether the plaintiff could recover only her deposit and expenses or in addition thereto

damages for the loss of her bargain. Counsel for the defendant agreed that the plaintiff was entitled to judgment for her expenses, but did not go so far as to admit responsibility for the return of the \$500 paid to one Riberdy, the agent who negotiated the sale.

The defendant relies on the clause quoted above and on the rule first laid down in *Flureau v. Thornhill* (1776), 2 Wm. Bl. 1077 and affirmed in *Bain et al. v. Fothergill et al.* (1874), L.R. 7 H.L. 158.

The headnote of the last mentioned case states:—

“Upon a contract for the sale and purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain.”

Dart on Vendors and Purchasers, 8th ed., p. 846, contains the following:—

“The rule introduced by *Flureau v. Thornhill*, however, has been held not to apply in certain cases. Thus in *Engell v. Fitch et al.* (1868), L.R. 3 Q.B. 314, it was laid down that the rule was inapplicable where the non-performance arises not from a difficulty as to title, but from the fact of the vendor not having first secured to himself the property which he assumes to sell; and, *a fortiori*, it cannot apply where the failure either to make out the title, or to deliver possession arises, not from the vendor’s inability, but from his unwillingness, on the ground of expense or otherwise, to remedy the defect or to procure possession for the purchaser.” And at p. 848:

“The decision in *Bain v. Fothergill*, however, applies only to cases where the vendor acting in good faith and without default on his part is unable to give a title, and does not conflict with the only point which was decided in *Engell v. Fitch*, viz., that a purchaser is entitled to substantial damages from a vendor who, to save himself trouble or moderate expense, or from mere caprice, refuses, or who wilfully neglects, to perform, to the best of his ability, his part of the contract, or (*semble*) where the vendor’s inability to complete is a financial one, and relates not to title but to conveyance.”

The same principles are discussed in *Lavine v. Independent Builders Ltd.*, [1932] O.R. 669, [1932] 4 D.L.R. 569, with regard to the right of rescission under a clause similar to the one on which the defendant relies in the case at bar. Middleton

J.A. in delivering the judgment of the Court quotes with approval from the judgment (at p. 419) of Collins M.R. in *In re Jackson and Haden's Contract*, [1906] 1 Ch. 412:

"It is to be noted that, in dealing with this right to rescind, the learned judges have always criticized most carefully the conduct of the parties to the contract, and the purpose for which the particular condition must be supposed to have been introduced, with a view to seeing whether or not it is, in the circumstances of the particular case, a condition that ought to be applied for the benefit of the person who had introduced it. In this particular case, there is no doubt that this clause was introduced for the benefit of the vendors. The Court considers whether or not the vendor has so acted in the matter as to be entitled to avail himself of that condition; or it may be put in other words. Can we construe this condition, in the circumstances, as applying to the particular state of facts which has caused the difficulty?"

"The Master of the Rolls then refers to the case of a vendor who undertakes to sell that which he knows he does not own, and adds:

"Now, what is the element . . . which determines the case? It seems to me to be an element of something on the part of the vendor less than the law requires of him in such cases. It may stop short of fraud, it may be consistent with honesty; but, at the same time, there must be a falling short on his part—he must have done less than an ordinarily prudent man, having regard to his relations to another person, when dealing with him, is bound to do; and therefore where, knowing the exact facts, he had recklessly made a description of them which would mislead another person who did not know as much as himself (even though he thought that person might know as much as himself), there is a clear failure of duty on the part of the vendor which fairly disentitles him to say that a clause introduced into the contract for his benefit is introduced to meet such a case as that which has arisen here, namely, a reckless disregard by the vendor of his duty as to accuracy of statement when he is making a statement with a view to other people acting on it as correct. On that ground it is enough to say that this particular condition must be read (as against the persons who are taken to have introduced it . . . for their own benefit) as not applying to the particular case to which they seek to apply

it, namely, something arising wholly and solely out of their own recklessness in the manner in which they have formulated the contract."

Later in the same judgment (p. 674) is the following:

"*In re Des Reaux and Setchfield's Contract*, [1926] Ch. 178, is of importance. There the vendor sold something to which he had no title, but honestly believing that he could acquire the outstanding title from a trustee. This conduct was held to be reckless and unreasonable, and the vendor was denied the right to rescind."

The most favourable view that can be taken of Labadie's actions is that he honestly believed that his wife would join in the conveyance. Perhaps it could be argued that such conduct was not so reckless and unreasonable in relation to a wife as that of the vendor in *In re Des Reaux and Setchfield's Contract, supra*, who believed he could acquire the outstanding title from a trustee. Be that as it may there are other indications of the bad faith in repudiating which is pleaded against Labadie. The defendant received the property from his father's estate and later conveyed it to himself and his wife as joint tenants for a nominal consideration. The general facts do not indicate that the wife contributed anything to the acquiring of the property, or paid anything for her interest. While not conclusive, of course, such circumstances make it a little harder to believe that the wife would be obdurate and refuse to sign if the husband made serious endeavours to obtain her signature. The defendant's evidence was that his wife insisted on \$10,000 being received for the property. He admitted at the trial that he did not offer his wife \$5,000 out of the purchase money instead of \$4,500 to induce her to convey. The wife was not called as a witness and no explanation offered as to her absence.

The offer was dated 18th May 1943, and accepted within two or three days. The defendant says his wife promptly refused her consent to the sale. He does not give any history of trying to persuade her but no word of her refusal to convey reached the plaintiff or her solicitor for approximately a month. Frank D. Riberdy the vendor's agent, says that he went to Labadie in the latter part of June when Labadie gave him the name of a person who was willing to buy at \$10,000. According to Riberdy, Labadie wished him to make a sale to the new pur-

chaser pointing out that there would be more commission for Riberdy on a \$10,000 sale than on a \$9,000 sale.

Where a vendor repudiates under a clause such as the one in question, it does not seem unreasonable that there should be some burden on him to show that he acted in good faith. The defendant has not only failed to do so, but the evidence points the other way to such an extent that in my opinion a finding of bad faith on the part of the defendant is justified.

The evidence on *quantum* of damage is not very satisfactory but in view of the defendant's own statement that there was a purchaser in sight willing to pay \$10,000, it is not excessive to fix the plaintiff's damages for the loss of her bargain at \$500.

The plaintiff's expenses were proven at \$94.65 and she is entitled to such amount.

The plaintiff is also entitled to recover the sum of \$500 paid to Frank D. Riberdy as a deposit on the 18th day of May, 1943, with interest at 5 per cent. from such date. The written offer which was accepted specifically provides for payment of a \$500 cash deposit to the agent of the vendor. "Where money has been properly received by an agent, the action to recover it must be brought against the principal, though it may not have come to his hands": Dart, *op. cit.*, p. 842.

The claim of Teras Dubensky is dismissed without costs.

The plaintiff Helen Chumack is entitled to her costs, subject to a set off of any costs incurred by the defendant owing to the inclusion of Dubensky as a plaintiff in the action.

Judgment accordingly.

Solicitors for the plaintiffs: Spencer and Donaldson, Windsor.

Solicitor for the defendant: George Arthur Yates, Windsor.

[ROACH J.]

Sinclair v. Blue Top Brewing Company Limited et al.

Companies—Shares—Certificates—Sale of Shares under Execution—Loss of Certificate—Right of Buyer to Registration as Owner of Shares—The Companies Act, 1934, (Dom.), c. 33, ss. 36, 38, 125—The Execution Act, R.S.O. 1937, c. 125, ss. 11, 12, 14.

Where shares in a company (not listed upon any stock exchange) are sold under an execution against the person registered in the books of the company as owner thereof, and there is no proof that any other person claims an interest in the shares, the buyer is entitled to be registered as owner, and to have a certificate issued to him, notwithstanding his inability to produce the original certificate, if there is no provision in the letters patent or the by-laws of the company making production of the original certificate a condition precedent to such registration. *Smith v. The Walkerville Malleable Iron Company* (1896), 23 O.A.R. 95, considered.

AN action for a declaration and other relief. The facts, and the relief claimed, are fully set out in the reasons for judgment.

12th, 15th and 16th June 1944. The action was tried by ROACH J. without a jury at Toronto.

J. C. McRuer, K.C., for the plaintiff.

H. C. Walker, K.C., for the defendant Blue Top Brewing Company Limited.

G. T. Walsh, K.C., for the defendant Trotter.

No one for the defendant Dominion Bond and Debenture Corporation Limited.

30th September 1944. ROACH J.:—The Huether Brewery Limited was a company incorporated under The Companies Act of Ontario. A certificate no. 523, dated 30th August 1924, for 598 shares of its common stock and a certificate no. 524, dated 11th September 1924, for 21 shares of its common stock, were issued to the defendant Dominion Bond and Debenture Corporation Limited, hereinafter called "Dominion Bond". Later, Dominion Bond, being indebted to the defendant Trotter, delivered these certificates to Trotter to be held as collateral security.

In January 1927 the defendant brewing company was incorporated by letters patent under the Dominion Companies Act under the name Huether Brewing Company Limited. It acquired all the assets of The Huether Brewery Limited. The Trusts and Guarantee Company Limited was appointed the transfer agent of the defendant brewing company. Pursuant to the mechanics adopted in connection with this sale and purchase, certificates no. 523 and no. 524 were surrendered to the transfer

agent on 18th March 1930, and a certificate no. 798 for 598 shares, and a certificate no. 799 for 21 shares, of the common stock of the defendant brewing company were issued in the name of Dominion Bond, and that company was entered on the share register of the defendant brewing company as the owner thereof, and has so remained to this date.

By supplementary letters patent dated the 25th day of September 1936, the name of the defendant brewing company was changed to Blue Top Brewing Company Limited.

In January 1939 there was a change made in the share structure of the defendant brewing company, whereby owners of common shares became entitled to class "B" stock of the company, share for share. Certificates nos. 798 and 799 were never surrendered, nor was application ever made by anyone to have new certificates for class "B" shares issued in their stead.

In May 1940 one MacLean recovered a judgment against the defendant Dominion Bond and caused a writ of *fi. fa.*, bearing date 18th July 1940, to be issued to the Sheriff of the County of Waterloo against its goods and chattels. On 12th December 1940 the sheriff served the defendant brewing company with the statutory notice under The Execution Act, R.S.O. 1937, c. 125, of the seizure by him of "all shares of Dominion Bond and Debenture Company Limited" in the brewing company. Attached to the notice of seizure was a copy of the writ of *fi. fa.*. The sheriff then duly advertised a sale of the shares seized by him and described in the advertisement as 619 shares of class "B" stock of the defendant brewing company and sold those shares to the plaintiff by public auction on 14th January 1941, for the sum of \$300. On 22nd January 1941, the sheriff served the defendant brewing company with a true copy of the writ of *fi. fa.* indorsed with a certificate of the sale by him to the plaintiff of "619 shares of Class 'B' common stock". Subsequently the plaintiff demanded that certificates for the shares thus purchased by him be issued to him by the defendant brewing company and that he be entered on the books of the company as the owner thereof. Before the defendant brewing company would agree to issue these certificates, or enter the plaintiff on its books as owner of these shares, it demanded that the original certificates nos. 798 and 799 be first surrendered, or in the alternative that the plaintiff deliver to it a satisfactory bond indemnifying it against any claim that might subsequently be made by

any other person claiming to have acquired the ownership in the shares prior to the sheriff's sale. The plaintiff could not surrender the certificates because he did not have them. Nor did the sheriff ever have them. Their whereabouts has remained a mystery. I think that, on the evidence, there can be no doubt but that the shares (*i.e.*, the common shares, not the class "B" shares) were issued and the certificates were delivered to some one. The president, who is also managing director, of Dominion Bond gave evidence, and, trusting to his recollection, he was unable to recall his company having received the certificates, and was of the impression that they had never been delivered to it.

In the lapse of time since May 1930 certain of the records of The Trusts and Guarantee Company Limited as transfer agent have been destroyed. In June 1931 it ceased to be transfer agent and sent all the capital stock records in its possession to the company, and under date 22nd June 1931, it wrote a letter to the company inventorying these records. No mention is therein made of the certificates in question. It is a reasonable conclusion therefore that prior to that date it had delivered the certificates to some one.

In this action the plaintiff pleads his purchase of the shares in question and claims:

- (a) a declaration that he is the owner of the shares purchased at the sheriff's sale;
- (b) an order directing the defendant brewing company to register him as the owner thereof and to deliver a certificate therefor to him;
- (c) the appointment of a receiver to receive any dividends or benefits accruing to him as the owner of the said shares;
- (d) damages by reason of the failure of the defendant brewing company to enter him on the share register as the owner of the said shares.

The defendant brewing company, pleading, states that it duly issued and delivered to the defendant Dominion Bond certificates nos. 798 and 799 for 21 shares and 598 shares respectively of its common stock; that owners of its common stock became and remain entitled to its class "B" stock, share for share, but that the defendant Dominion Bond has never exchanged its share certificates for common stock for class "B" stock; that it has no knowledge of the interest which the defendant bond com-

pany had in the said shares at the time either of the seizure or of the sale; that it has received notice that the defendant Trotter claims some interest or ownership in the said shares; that the original certificates have not been tendered to it, and that no indemnification has been tendered to it.

The defendant Trotter, pleading, states that he is not claiming any right, title or interest in or to the shares, and that prior to the institution of the action he furnished the plaintiff with an affidavit in which he stated, *inter alia*, that the certificates for shares in the defendant brewing company were never delivered to him, that the sale by the sheriff was with his knowledge and consent, and that he relinquished his right, title and interest in the said shares.

The defendant Dominion Bond, pleading, states that it makes no claim to the shares in question; that it received due notice from the sheriff that the sale was to take place on the date when the shares were later sold; that it delivered the certificates in Huether Brewery Limited to the transfer agent, but did not receive any certificates for shares in the defendant brewing company, and that it has never dealt with the said shares.

The relevant sections of The Execution Act are as follows:—

“11. Shares and dividends, . . . in . . . an incorporated company having transferable shares shall be deemed to be personal property found in the place where notice of the seizure thereof is served, and may be seized under execution and may be sold thereunder in like manner as other personal property.”

“12(1). The sheriff on being informed on behalf of the execution creditor that the execution debtor has such shares, and on being required to seize the same, shall forthwith serve a copy of the execution on the . . . company with a notice that all the shares of the execution debtor are seized thereunder, and from the time of service the seizure shall be deemed to be made . . . , and every seizure and sale made under the execution shall include all dividends, premiums, bonuses or other pecuniary profits upon the shares seized, and the same shall not, after notice as aforesaid, be paid by the . . . company to any one except the person to whom the shares have been sold.”

“14. Where any such share is sold the sheriff shall within ten days after sale serve upon the . . . company at some place where service of process may be made a copy of the execution, with his certificate endorsed thereon certifying the sale and the

name of the purchaser who shall have the same rights and be under the same obligations as if he had purchased the share from the execution debtor at the time of the service of notice under section 12."

All these statutory provisions were complied with in the sale to the plaintiff.

The relevant sections of The Companies Act, 1934 (Dom.), c. 33, are as follows:—

"125(1). All books required . . . to be kept by the company shall in any action, suit or proceeding against the company or against any shareholder be *prima facie* evidence of all facts purporting to be thereby stated."

"36(1). No transfer of shares, unless made by sale under execution or under the decree, order or judgment of a court of competent jurisdiction, shall, until entry thereof has been duly made in the register of transfers or in a branch register of transfers of the company, be valid for any purpose whatsoever, save only as exhibiting the rights of the parties thereto toward each other, and if absolute of rendering any transferee jointly and severally liable with the transferor to the company and to its creditors.

"(2). Notwithstanding the provisions of subsection one of this section, the delivery of any certificate for fully paid shares, with a duly executed transfer endorsed thereon or delivered therewith, shall constitute a valid transfer of the shares comprised therein, if such shares are listed on any recognized stock exchange at the time of such delivery, provided that, until entry of such transfer is duly made in the register of transfers or in a branch register of transfers of the company, the company may treat the person in whose name the shares comprised in the said certificate stand on the books of the company as being solely entitled to receive notice of and vote at meetings of shareholders and to receive any payments in respect of such shares whether by way of dividends or otherwise."

"38(1). Subject to subsection two of this section and to the power of the company by by-law to prescribe the form of transfer and to regulate the mode of transferring and registering transfers of its shares, the right of a holder of fully paid shares of a public company to transfer the same may not be restricted."

S. 38(2) is not applicable to the facts in the case at bar.

The form of certificate issued by Huether Brewing Company Limited was as follows:

"This certifies that . . . is the holder of . . . fully paid and non-assessable Common Shares of the Capital Stock of Huether Brewing Company, Limited, having the par value of Ten Dollars (\$10.00) each transferable only on the books of the Corporation by the holder in person or by attorney duly constituted and upon the surrender of this Certificate properly endorsed.

"This Certificate shall not become valid until countersigned by the Transfer Agent of the Corporation."

The form of certificate issued by Blue Top Brewing Company Limited covering its class "B" shares is in similar form except as to the description of the shares covered thereby.

The shares of the defendant brewing company were first listed on the Toronto Stock Exchange in June 1941.

As of the date of the seizure and sale, Dominion Bond was shown in the books of the brewing company as the owner of 619 shares of common stock, and under s. 125 of the Dominion Companies Act that is *prima facie* evidence of its ownership.

The defendant brewing company has specifically pleaded that:

"Owners of common stock of Huether Brewing Company Limited became and remain entitled to Class 'B' stock of this Defendant share for share, but the said Dominion Bond and Debenture Corporation Limited has never exchanged the said share certificates for certificates of Class 'B' stock of this Defendant."

Obviously, in the alteration of the share structure of the brewing company, the class "B" stock was created and issued in substitution for the common stock, so that as of the date of the seizure and sale the only shares owned by Dominion Bond were class "B" shares.

The *prima facie* evidence of ownership of the shares by Dominion Bond could be rebutted by evidence that some other person had some title to or interest in them. The only person named as at any time claiming such adverse title was the defendant Trotter. That claim can now be quickly disposed of, because in this action he specifically pleads that he has no right, title or interest in the shares now claimed by the plaintiff.

By s. 36(1) of the Dominion Companies Act, any transfer of those shares by Dominion Bond would be invalid except as exhibiting the rights of Dominion Bond and its transferee *inter se*. S. 36(2) has no application, because at the time of the seizure and sale by the sheriff those shares were not listed on any stock exchange. Moreover, the president of Dominion Bond stated in evidence that he had always been the signing officer of Dominion Bond, and that he never executed any assignment of these shares to any person, or in any way dealt with them.

It must, therefore, be concluded that as of the date of the seizure and sale by the sheriff, Dominion Bond was the owner of 619 shares of class "B" stock, and those shares were sold by the sheriff to the plaintiff.

By virtue of s. 14 of The Execution Act, the plaintiff acquired the same rights as if he had purchased those shares from Dominion Bond. Do those rights include a right to have his name entered on the stock register of the brewing company as the owner thereof, and a certificate issued to him therefor, without the production of the old certificates?

There is no evidence that, by any provision in the letters patent incorporating the company, or in the by-laws of the company, the production and surrender of these certificates is a condition precedent to the right of a transferee or new owner to be registered on the stock register of the company.

Reference was made during the argument to *Smith v. The Walkerville Malleable Iron Company* (1896), 23 O.A.R. 95. The facts in that case are stated in the headnote:

"A company incorporated under The Ontario Joint Stock Companies' Letters Patent Act, R.S.O. ch. 157, issued a certificate stating that a certain shareholder was entitled to twenty-two shares of the capital stock, as he in fact at the time was. The shares were not numbered or identified, but the certificate was numbered and contained the words, 'Transferable only on the books of the company in person or by attorney on the surrender of this certificate.' The shareholder assigned the shares to the plaintiff for value, and gave the certificate to him with an assignment endorsed thereon. The plaintiff gave no notice to the company, and did not apply to be registered as a shareholder until several months had elapsed, and in the meantime the shareholder executed another transfer of the shares for value to an innocent transferee, who was registered by the company

as the holder of the shares without production of the certificate." It was held that the transfer to the plaintiff, in view of s. 52 of the statute under which the company was incorporated—which section is similar to sec. 36(1) of the Dominion Companies Act, *supra*—conferred upon him a mere equitable title, which was cut out by the subsequent transfer, and that while the company might have insisted upon production of the certificate, they were not bound to do so, and were not estopped from denying the plaintiff's right to the shares.

At p. 105, Osler J.A., dealing with the words "in person or by attorney on the surrender of this certificate", says: "The latter provision is not required either by statute or by the by-laws of the company (which we called for) and it has been held in more than one case, that the stipulation is one which the company may waive if satisfied otherwise of the right of the transferee to be registered. In other words, the title of the transferee, or rather his right to have his transfer registered or entered, and thus to have his legal title perfected, does not depend, in the case of shares of the character of those we are now dealing with, upon his possession of the share certificate."

At p. 109, MacLennan J.A., dealing with the same phase of the case says: "Was the company bound to refuse, or could they lawfully refuse, to transfer without the production of it? It is not necessary to decide that they could lawfully refuse, but I think it is clear they were not bound to refuse. The shares were standing in White's name" (White was the transferor); "there had been no transfer made in the books; there could be no valid transfer made elsewhere; a transfer on the back of the certificate could be no better than if made by a separate document. The certificate itself could be of no value to any one else. It was not negotiable, and I confess I see no obligation, nor any good reason, why the company should . . . insist on its production."

The case at bar is distinguishable from the *Smith and Walkerville* case in that, in the case at bar, the shares were sold under The Execution Act.

The purpose of The Execution Act is to enable an execution creditor to realize on his judgment. To accomplish that purpose it enables the execution creditor to seize and sell shares owned by the execution debtor. That purpose could, and often would, be defeated if the company whose shares are sold under execu-

tion, without some enabling provision in the letters patent or its by-laws, could insist upon production and surrender of the certificate before registering the purchaser as the new owner of the shares thus sold and issuing a new certificate to him. An obstinate execution debtor would likely not give up the certificate, and no one would be foolish enough to buy shares at a sheriff's sale if he could get no evidence of his title.

It is true that, at one time, the defendant Trotter, or some one purporting to represent him, made some claim to the shares in question, but before the sale by the sheriff he consented to that sale, and before this action was commenced, he, to the knowledge of the brewing company, relinquished any claim which he had. In the circumstances of this case I can see no valid reason why the brewing company should have refused to register the plaintiff as the owner of the shares in question, and to issue a certificate therefor to him.

There will, therefore, be judgment—

- (a) declaring the plaintiff to be the owner of 619 shares of class "B" stock of the defendant brewing company;
- (b) directing the defendant brewing company to register him as the owner thereof, and to issue to him a certificate therefor;
- (c) directing the defendant brewing company to pay to the plaintiff any dividends or profits heretofore declared by the said defendant in respect of such shares, and not heretofore paid;
- (d) the defendants Trotter and Dominion Bond shall have their costs of the action against the plaintiff, and the plaintiff shall have his costs and the costs payable by him to those defendants against the defendant brewing company.

Judgment accordingly.

Solicitors for the plaintiff: McRuer, Mason, Cameron & Brewin, Toronto.

Solicitors for the defendant Blue Top Brewing Company Limited: Sims, McIntosh, Schofield & Sims, Kitchener.

Solicitor for the defendant Trotter: George T. Walsh, Toronto.

[KELLOCK J.A.]

Montreal Trust Company v. Abitibi Power & Paper Company Limited et al.

Debentures and Bonds—Interest on Overdue Interest—Construction of Terms—Principal and Interest Payable in Foreign Funds—Manner of Taking Account in Trustee's Action—Moneys in Receiver's Hands—The Judicature Act, R.S.O. 1937, c. 100, s. 33.

The trustee under a bond mortgage given by the defendant company sued, claiming enforcement of the security by sale or foreclosure or otherwise, that an account should be taken of what was due by the defendant company to the plaintiff and all holders of the bonds secured by the mortgage, and an order for payment by the defendant company of the amount found due upon the taking of the said account. Judgment was given declaring that the trustee and the bondholders were entitled to a first charge upon the undertaking, property and assets of the company. An order was later made for the sale of the undertaking, etc., but the sale proved abortive. The Legislature then passed a special Act, prohibiting further proceedings under the order for sale, and, except with the consent of the Attorney-General, the taking of any further step in the action. The liquidator of the defendant company now moved, with the consent of the Attorney-General, for an order directing the taking of an account of the amount owing by the company.

Held, although no sale could now take place under the legislation, yet such an account must be taken at some stage of the proceedings, and the defendant company was entitled to have it taken now. Since, however, costs might thereby be increased, the costs of the account should be reserved.

Held, further: (1) Interest was payable on the overdue interest, both under the terms of the bond mortgage itself and under s. 33 of The Judicature Act, R.S.O. 1937, c. 100. *Toronto Railway Company v. The City of Toronto*, [1906] A.C. 117 at 121, applied.

(2) Both the principal moneys and the interest being payable, at the holders' option, in United States currency, conversion, if the plaintiff had claimed a personal judgment on the promise to pay, would have had to be directed as of the maturity date of the bonds and coupons. *The Custodian v. Blucher*, [1927] S.C.R. 420, referred to. Since, however, no such relief was claimed, and the account now being asked for was merely for the purpose of ascertaining the amount to which the plaintiff and the bondholders were entitled, and which the defendant would be required to pay to redeem, the date of the Master's report should be the date taken for conversion. *In re Chesterman's Trusts; Mott v. Browning*, [1923] 2 Ch. 466, followed. This report, however, should be final only if acted upon as a basis for immediate redemption or distribution.

(3) The credit to which the company was entitled for payments made by the receiver and manager on account of the principal of the bonds was not the full amount of the payments made, in Canadian funds, but the amounts respectively by which the indebtedness outstanding for principal would have been reduced if the receiver had purchased American funds on the respective dates and paid the proceeds to the plaintiff.

(4) Neither the trustee nor the bondholders were chargeable with interest on the moneys in the hands of the receiver and manager from time to time. The receiver was an officer of the Court, not an agent of any of the parties. *Parsons et al. v. The Sovereign Bank of Canada*, [1913] A.C. 160, referred to. The moneys in his hands were moneys belonging to the Court. *De Winton v. The Mayor of Brecon* (1860), 28 Beav. 200, referred to. He could discharge himself

only by paying in obedience to the order of the Court, and the liquidator's only remedy, if he thought that the receiver was retaining excessive amounts in his hands, was to apply to the Court to direct its officer accordingly.

A MOTION for an order directing an account.

3rd, 4th and 9th May and 6th June 1944. The motion was heard by KELLOCK J.A. in Weekly Court at Toronto.

D. L. McCarthy, K.C., N. T. Berry, and R. I. Frears, for the liquidator.

C. F. H. Carson, K.C., and R. W. S. Johnston, for the plaintiff.

Glyn Osler, K.C., and D. G. Guest, for the individual defendants.

C. F. Farwell, for general creditors.

W. Judson, for shareholders.

10th June 1944. KELLOCK J.A.:—This is a motion on behalf of the liquidator of the defendant company for an order directing that an account be taken in the Master's office of what is due and owing by the company to the plaintiff and all the holders of bonds secured by the indenture and mortgage referred to in the writ of summons. By the judgment in this action it was declared: (1) that the plaintiff and the holders of bonds of the defendant company issued under the said indenture and mortgage, to which I shall hereinafter refer as the bond mortgage, are entitled to a first charge upon the undertaking, property and assets of the defendant company for payment of all moneys secured by the said bond mortgage and by the bonds issued and outstanding thereunder, and (2) that the trusts of the said indenture and mortgage ought to be performed and carried into execution. It was also ordered (3) that the receiver and manager appointed by the order of 10th September 1932 should be continued, and (4) liberty to apply was reserved to the parties.

The statement of claim had asked in addition for the enforcement of the security of the bond mortgage by sale or foreclosure or otherwise, and that an account should be taken of what was due by the defendant company to the plaintiff and all the holders of bonds secured by the bond mortgage, and for payment by the defendant company of the amount found due upon the taking of the said account.

By the order of Middleton J.A. of 10th June 1940, a sale of the undertaking, property and assets of the defendant company was directed to be held on the 16th October following under

the direction of the Master, and the order directed that the purchase money should be paid into court to the credit of the action subject to further order, and that the Master should report to the Court pursuant to the practice and procedure in that behalf. This order would appear to have been made under the provisions of Rule 465. One of the matters to be dealt with by the Master in his report would be the ascertainment of the amount due to the plaintiff and the bondholders. The order gave leave to any bondholder or bondholders to bid at the sale and to become purchaser and provided that all powers and privileges conferred on bondholders by the bond mortgage, including the rights and privileges conferred by para. 34 thereof, should be exercisable by any bondholder or bondholders who might purchase.

At the date of the order just mentioned, the receiver and manager had not been able to pay anything on account of the indebtedness under the bond mortgage. Since that time, however, he has, with the sanction of the Court, paid large sums to the plaintiff for distribution among the bondholders in respect of the principal owing on their bonds. The sale directed by the above order of 10th June 1940 proved abortive by reason of there being no purchaser forthcoming willing to pay the amount of the reserve bid.

On 9th April 1941 the Legislature of the Province of Ontario passed an Act entitled "The Abitibi Power & Paper Company Limited Moratorium Act, 1941", being 5 Geo. VI, c. 1, by which further proceedings under the order for sale of 10th June 1940 were prohibited. The statute also prohibited, without the consent of the Attorney-General, any new action for the purpose of realizing on the security comprised in the bond mortgage, and any further step or order in this action. The consent of the Attorney-General to the present motion has, however, been obtained, and is filed.

On 4th December 1941 Middleton J.A., being of opinion that this legislation was *ultra vires*, made an order for the sale of the undertaking of the defendant company under the direction of the Master, and fixed a date for such sale. An appeal from this order was dismissed by the Court of Appeal: *Montreal Trust Company v. Abitibi Power & Paper Company Limited*, [1942] O.R. 183, [1942] 2 D.L.R. 349, but this order was in turn reversed by the Privy Council: *Abitibi Power and Paper Company*,

Limited v. Montreal Trust Company et al., [1943] A.C. 536, [1943] 2 All E.R. 311, [1943] 4 D.L.R. 1, [1943] 3 W.W.R. 33, 25 C.B.R. 6.

This action then, in the form which it has taken, is for the purpose of realizing under the charge in the bond mortgage, by sale of the assets covered thereby. The above legislation has so far prevented an actual sale, but the action is directed to that end, and the accounting which is sought on this motion is the usual account incident to such a proceeding, namely, for the purpose of ascertaining the amount to which the plaintiff and the bondholders are entitled out of the proceeds of realization: *Re Imperial Steel Corporation Ltd.; Watson v. Imperial Steel Corporation Ltd.* (1925), 28 O.W.N. 242. All parties have joined in the request, that, should I be of opinion that an accounting should be directed at this time, I should give directions as to certain matters which will arise, *viz.*: (1) whether or not overdue interest on the bonds itself bears interest; (2) what effect should be given to the provision relating to payment in alternative currencies; (3) what credit should be given to the defendant company in respect of the moneys paid to the plaintiff by the receiver and manager under orders of the Court for distribution in respect of the principal of the bonds, having regard to the fact that these moneys were paid in Canadian funds, United States funds being at a premium of 11 per cent. at each of the respective dates of payment; and (4) whether the plaintiff or the bondholders are chargeable with interest on moneys in the hands of the receiver and manager from time to time.

In my opinion an account of the nature already referred to should be directed. It necessarily must be taken at some stage of the proceedings, and I think the defendant company is entitled to have it taken now, even although, as things stand, a sale cannot actually take place, because the company may desire to redeem or to attempt a compromise of the plaintiff's claim. The question as to the costs of the taking of the account should, however, be reserved. It may be that to proceed with the account now may increase costs, as a further account may later be found necessary, and for that reason the question of costs should be reserved.

Dealing then with the first question, default occurred in payment of the interest which fell due on the first of June 1932. On 27th August following a demand was served upon the defend-

ant company by the trustees under the bond mortgage, for payment "forthwith of the principal amount of all bonds now outstanding under the said indenture and mortgage and of all interest now due on such bonds and of all other moneys due and payable by you under the said indenture and mortgage." This demand purported to be made pursuant to the provisions of para. 24 of the bond mortgage. By para. 21 it is provided that "The security hereby constituted shall become enforceable, subject to the terms hereinafter contained, in each and every of the events following (herein referred to as events of default): (a) If the Company makes default in payment of any interest due on the Bonds secured hereunder or any of them or in any sinking fund payment and any such default shall have continued for a period of sixty (60) days."

Para. 24 provides: "In case the security hereby constituted shall become enforceable as hereinbefore provided, the Company shall and will pay forthwith to the Trustees on demand for the benefit of the holders of the bonds secured hereby the principal amount of all Bonds then outstanding and interest then due thereon, and such payment when made shall be deemed to have been made on such Bonds and coupons, *and any moneys so received by the Trustees shall be applied in the same manner as if they were proceeds of a sale of the mortgaged premises made to enforce the security hereof*, and the Company shall and will pay to the Trustees on demand all other moneys due and payable by it hereunder; and the Trustees may in their discretion . . . make such demand and upon such demand being made . . . the principal of all Bonds outstanding hereunder shall, together with interest thereon, become immediately due and payable, anything therein or herein contained to the contrary notwithstanding." (The italics are mine.)

It is para. 29 that deals with the application of moneys arising from a sale of the mortgaged premises. Such moneys, after payment of certain costs, charges and expenses are to be applied "in or towards payment to the holders of the Bonds *pari passu* in proportion to the amount due to them respectively . . . and of all due and unpaid interest and coupons and premium, if any, with interest on all sums overdue at the rate which such Bonds bear". In my opinion this is a perfectly clear provision entitling the holders of coupons to interest at the contract rate of 5 per cent. per annum on overdue coupons,

from their respective dates of maturity, out of the proceeds of sale of the assets subject to the bond mortgage. Consequently the moneys received from the mortgagor company, if paid pursuant to the demand, are to be moneys which will permit of application upon bonds and coupons in the manner provided for by para. 29. This involves that such moneys shall include interest on past due coupons "at the rate which such Bonds bear". In my view, if there be any ambiguity in para. 24, standing by itself, such ambiguity is resolved by the reference therein to the provisions of para. 29.

Mr. McCarthy admits that as of 27th August 1932, by reason of the events which had by that time occurred, including the demand of that date, there was due and payable: (1) the principal of all outstanding bonds; (2) the interest which fell due thereon on 1st June 1932, represented by the coupons of that date; (3) interest at 5 per cent. on the principal of the bonds, and (4) interest at the same rate on the amounts of the coupons due 1st June 1932. He contends, however, that upon the total of these amounts thereafter simple interest only ran at 5 per cent. per annum, and that subsequently-maturing coupons are to be ignored for the purpose of interest thereon. He argues that upon the acceleration of the principal of the bonds, by virtue of the demand of 27th August 1932, there was a crystallization of the indebtedness as of that date, which thereafter was subject to simple interest on the whole amount of bonds and coupons then due. I do not think this is a sound contention.

Para. 19 contains a covenant on the part of the mortgagor company "(c) That it will well, duly and punctually pay or cause to be paid to every holder of any Bond issued and secured hereunder the principal and interest accrued thereon, and premium, if any, at the dates and places, in the moneys and in the manner mentioned herein . . . and in the coupons thereto belonging".

Para. 24 and its effect according to my opinion has already been referred to.

Reference may also be made to para. 49, which provides that all sums which may at any time become payable, either at maturity, on a declaration, on redemption, or otherwise, on account of any bonds or coupons "or any interest or premium thereon" shall be payable at any of the places at which the principal and interest of the bond and coupon is payable, and in any coin or currency in which the bond or coupon would be payable at

such place. This paragraph clearly contemplates that the coupons bear interest after maturity.

Reference may also be made to the provisions of para. 34, which entitle a purchaser to turn in, as purchase money, bonds or matured coupons to the amount which would upon distribution of the net proceeds of such sale be payable thereon. This again refers back to the provisions of para. 29, and would entitle a purchaser to have credit on his purchase moneys in respect of interest on overdue coupons. The same theory underlies the provisions of para. 25, relating to the application of moneys received by the Canadian trustee arising from taking possession of the mortgaged premises.

In my opinion there is no ground for the contention that by reason of the demand of 27th August 1932 the amount of the then indebtedness, which admittedly included interest on the coupons past due since 1st June 1932, was thereafter the total amount then outstanding on the bonds and coupons with simple interest only. No authority has been cited to support the argument, and I have not been able to find any. A demand under para. 24 is not to be given the effect of a judgment for the amount demanded. In my opinion the effect of the demand was to accelerate the time for payment of the principal of the bonds then outstanding, but my view is that it had no effect with respect to the liability to pay interest. The covenant of the defendant company to pay the principal and interest "at the dates and places, in the moneys and in the manner mentioned herein and in such Bonds and in the coupons thereto belonging" (para. 19(c)), as well as the covenant or promise in the coupons themselves, remained: *The Eastern Trust Company v. Cushing Sulphite Fibre Company, Limited* (1906), 3 N.B. Eq. 392 at 402, 2 E.L.R. 93. In my opinion, therefore, it is provided by the terms of the bond mortgage itself that overdue coupons themselves bear interest at the rate provided for in the trust deed.

It is in any event argued on behalf of the plaintiff and the individual defendants that under the latter part of s. 33 of The Judicature Act, R.S.O. 1937, c. 100, interest is payable upon the coupons at the legal rate from their respective dates of maturity. The statute provides that interest "shall be payable in all cases . . . in which it has been usual for a jury to allow it." *Toronto Railway Company v. The City of Toronto*, [1906] A.C. 117, C.R. [1906] A.C. 286, is referred to. As stated in

the judgment, delivered by Lord Macnaghten, at p. 121, in all cases where in the opinion of the Court the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the parties in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right. In my opinion this principle is applicable here, and it should be held that the coupons bear interest from their respective maturity dates at the legal rate of 5 per cent. per annum. This being so, then the security provided by the bond mortgage, in my opinion, extends to this interest, para. 15 providing that it is "to secure the due payment of the principal and interest of the Bonds". This would, in my opinion, be sufficient of itself, apart from the other terms to which I have referred, in the absence of express provision to the contrary.

In my opinion, therefore, the Master should, in taking the account hereby directed, allow interest at the rate of 5 per cent. per annum on the coupons from their respective due dates. The rate is the same whether the express provisions of the bond mortgage as to interest or interest at the contract rate govern, or whether the rate to be applied is the legal rate. In ascertaining the amount of interest the Master will, of course, take into consideration the payments on account of principal of the outstanding bonds which have already been made.

I do not think it necessary to deal with the further contention made on behalf of the plaintiff and the individual defendants, that the coupons are in effect promissory notes and therefore bear interest from their respective dates at the legal rate, nor with the further contention based on the provisions of s. 34 of The Judicature Act. There may be some question as to whether the provision in the coupons providing for payment "free from taxes except as stated in said Bond" prevents the coupon being for a "sum certain" as those words are used in s. 176 of The Bills of Exchange Act, R.S.C. 1927, c. 16, or in s. 34 of The Judicature Act, R.S.O. 1937, c. 100. Having reached the conclusion that overdue coupons do bear interest it is not necessary to consider these further contentions. *Ayrey et al. v. Fearnside et al.* (1838), 4 M. & W. 168, 150 E.R. 1388, and *Smith v. Myers* (1904), 69 N.E. 858, may have some bearing if this question falls to be decided.

As to the second question, the bonds are made payable, at the option of the holder, in United States funds, upon presentation at certain named places in the United States of America. The coupons contain a similar provision, except that nothing is said as to presentation.

By clause 19(c) of the bond mortgage the defendant company covenants "That it will well, duly and punctually pay or cause to be paid to every holder of any Bond issued and secured hereunder the principal and interest accrued thereon, and premium, if any, at the dates and places, in the moneys and in the manner mentioned herein and in such Bonds and in the coupons thereto belonging".

And it is provided by para. 49 that "All sums which may at any time become payable whether at maturity, on a declaration, on redemption, or otherwise, on account of any Bond or coupon or any interest or premium thereon, shall be payable at the option of the holder at any of the places at which the principal and interest of such Bond or coupon is payable and in any coin or currency in which the same would be payable at such place. The company will pay to the Authenticating Trustee any expenses or costs of obtaining the exchange necessary to meet the payment of the redeemed Bonds in the currency requested by the holders thereof."

Mr. McCarthy argues that the holder of a bond is entitled to payment on presentation only, and that as there is no evidence that any bonds have been presented for payment, no effect can be given to the provisions for payment in United States funds. In my opinion, it being clear that presentation would have been an idle gesture, the want of it is not a valid objection: *Re Thomson and The Victoria Railway Company* (1881), 9 P.R. 119 at 122; *The Montreal City and District Savings Bank v. The County of Perth* (1881), 32 U.C.C.P. 18 at 27.

The question then arises as to the date for conversion into Canadian funds which the Master should adopt. Were this proceeding one in which a personal judgment was sought against the defendant company on the promise to pay contained in the bonds and coupons, or on the covenant for payment in the bond mortgage, then in my opinion the decision in *The Custodian v. Blucher*, [1927] S.C.R. 420, [1927] 3 D.L.R. 40, as well as other authorities, would require that conversion should be directed as of the respective maturity dates of the bonds and coupons,

which, in the case of the bonds, was 27th August 1932. In the case *In re Chesterman's Trusts; Mott v. Browning*, [1923] 2 Ch. 466, the Court was administering a fund in Court; in the course of the administration it appeared that some of the beneficiaries had mortgaged their interests to secure payment of certain sums in foreign currency payable at specific dates, and the Master was directed to inquire as to the amounts due in respect of these charges. It was held by Russell J., as he then was, and by the Court of Appeal, that as no personal judgment was being sought by the mortgagees, the date for conversion was the date of the Master's certificate. In the course of his judgment, at p. 474, Russell J. said: "This is in no sense an action against the mortgagors on their covenant, and still less is it a claim for damages for breach of contract. The true position is that the Court in dividing the funds ascertains what sums would be payable by the mortgagors if they came to the Court seeking to redeem, and those sums are payable out of the mortgage property to the mortgagees, and the balance to the mortgagors, and those claiming in respect of their titles. Upon that footing it appears to me that the correct date at which the sums of money found due in marks in the certificate is to be converted into English currency is the date of the certificate."

In the Court of Appeal, Lord Sterndale M.R. based his judgment on this point on the assumption that "if the mortgagees had in this case brought an action on the covenant in the mortgage to recover the money the principle would have applied." The principle referred to is that applied in *The Custodian v. Blucher, supra*. He then proceeds: "But no such action was brought. What took place was that, it becoming necessary to ascertain what sum was due on the mortgage, an inquiry for that purpose was directed and took place. That sum is ascertained, as it must be, in marks, and on payment of that sum in marks the mortgagor would be entitled to redeem the security. If after the ascertainment of the amount the mortgagor tendered the amount in marks I cannot see how the mortgagee could have refused it In this case the mortgagor does not pay the money himself, but it is paid out of a sum which is standing to the credit of an account in a Court in this country. I cannot see how that circumstance can entitle the mortgagee to be paid more than he would get if there were no fund, nor can I see how the amount payable upon the mortgage can depend upon the

position of the fund or the situation of the country in whose Court it stands." The judgment of Warrington L.J. is to the same effect. Younger L.J. dissented. Whatever the situation might be in an action for foreclosure and sale and for judgment on the covenant, the judgment in the case at bar does not include a judgment on the covenant, and the account now being asked for, as already pointed out, is for the purpose of ascertaining the amount to which the plaintiff and the bondholders are entitled out of the proceeds of sale of the assets charged with the outstanding bonds. In these circumstances, I think the above authority is to be followed, and the Master, in taking the account, will take the date for conversion as the date of his report. Such report, however, shall not be final unless made and acted on for the purpose of an immediate redemption or distribution, and the Master will, in his report, set a time for the purposes of the word "immediate". Should the rate of exchange subsequently vary, there will have to be a new account and a new report based on the changed rate. In other words, the plaintiff is entitled to have payment based on the rate of exchange prevailing at the time of redemption or distribution of the proceeds of sale. The true position is that the Court, in dividing the funds (*i.e.*, in the case of distribution of the proceeds of sale), ascertains what sums would be payable by the mortgagors if they came to the Court seeking to redeem: *In re Chesterman's Trusts, supra*, at p. 474.

With respect to the third question, it follows that the credit to which the defendant company is entitled on the taking of the account in respect of the moneys paid to the plaintiff on account of principal under orders of the Court will be, not the full amount of those payments in Canadian funds, but the amounts respectively by which the indebtedness outstanding on the bonds for principal would have been reduced had the receiver purchased American funds on the respective dates and paid the proceeds to the plaintiff.

With respect to the fourth question, in my opinion the bondholders are not chargeable with any interest in respect of any moneys in the hands of the receiver. The receiver is an officer of the Court. He is not an agent of any of the parties, but a principal: *Parsons et al. v. The Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476. The moneys in his hands are moneys belonging to the Court: *De Winton v. The Mayor of*

Brecon (1860), 28 Beav. 200, 54 E.R. 342. He can discharge himself only by paying in obedience to the order of the Court. If the liquidator is at any time of opinion that the receiver retains excessive amounts in his hands the remedy would appear to be to apply to the Court to direct its officer accordingly.

I would therefore direct the Master as above set forth. The costs of this motion will be reserved for disposition on any application to confirm the report of the Master or for further directions or otherwise.

Order accordingly.

Solicitors for the plaintiff: Johnston, Heighington & Johnston, Toronto.

Solicitors for the defendant company: Wright & McMillan, Toronto.

Solicitors for the individual defendants: Blake, Anglin, Osler & Cassels, Toronto.

[HOGG J.]

Welsh v. Bagnall.

Conflict of Laws—Jurisdiction—Matrimonial Causes.

Divorce and Matrimonial Causes—Jurisdiction of Courts—Matrimonial Domicile—Validity of Foreign Divorce—No Desertion by Husband—The Divorce Jurisdiction Act, 1930 (Dom.), c. 15.

The only courts which have jurisdiction to dissolve a marriage are those of the matrimonial domicile, *i.e.*, of the domicile of the husband. *Le Mesurier v. Le Mesurier et al.*, [1895] A.C. 517; *Attorney-General for Alberta v. Cook*, [1926] A.C. 444, applied. The only exception to this rule is that introduced by The Divorce Jurisdiction Act, 1930 (Dom.), c. 15, in the case of a wife who has been deserted by her husband. It follows that if a husband is domiciled in the Province of Quebec, a divorce obtained by the wife in the State of Florida is ineffective to dissolve the marriage, and that the wife cannot thereafter enter into a legal and valid marriage with another man.

Where it is shown that one of the parties to a form of marriage was already married to a person then living, so that the purported marriage is void *ab initio*, the other party is entitled to a decree of nullity *ex debito justitiae*; there is nothing discretionary about such a decree. *Grassick v. Grassick*, [1935] O.R. 50; *Bateman v. Bateman (otherwise Harrison)* (1898), 78 L.T. 472, followed; *dictum* of Middleton J.A. in *Leigh v. Leigh*, [1937] O.R. 239, disapproved.

Infants—Custody—Illegitimate—Prima Facie Right of Mother—Welfare of Child.

Although it is established that the mother of an illegitimate child has a *prima facie* right, with which the Court will not lightly interfere, to its custody, yet that right must yield to the paramount consideration of the welfare and best interest of the child, and if it is shown

that its best interest requires it to be left with the father, this will be done. *Wong v. Kozeyoh et al.*, [1942] O.W.N. 210, 536; *Re Jeanes* (1917), 11 O.W.N. 365, considered.

AN action by a husband for a declaration of nullity of his marriage with the defendant. The facts are fully stated in the reasons for judgment.

26th September 1944. The action was tried by HOGG J. without a jury at Toronto.

J. W. Pickup, K.C., for the plaintiff.

J. E. Corcoran, K.C., for the defendant.

18th October 1944. HOGG J.:—In this action the plaintiff claims a declaration that a marriage celebrated between him and the defendant Hilda Bagnall is null and void.

On the 16th October 1926, the said defendant was married, in the city of Toronto, to one John Bagnall, of the city of Montreal, in the Province of Quebec. The parties lived together as man and wife in Montreal for a period of between two and three months, when, according to the testimony of Bagnall, his wife left him, and they have never since lived together. Bagnall took proceedings in the Superior Court of the District of Montreal, for a divorce *a mensa et thoro*, and judgment in that action, declaring him to be separate from bed and board with the defendant, was delivered on the 13th May 1927. The plaintiff went through a form of marriage with Hilda Bagnall on the 26th December 1929, in the city of Buffalo, in the State of New York, one of the United States of America. The plaintiff testified that the defendant had told him, prior to his marriage to her, that she had obtained, in the State of Florida, a dissolution of her marriage with Bagnall, and an affidavit made by the defendant on the advice of counsel in Buffalo, and required in connection with the issue in that city of a marriage licence to the parties, sets out that she had been duly divorced on the 15th May 1929, by a decree of the Circuit Court of the 11th Judicial Circuit of Florida, in and for Dade County, from her former husband, John Lionel Bagnall, and that the said decree of divorce was not granted on the ground of adultery. She further deposed that neither she nor her former husband, Bagnall, had ever been a resident of or domiciled in the State of New York. Subsequent to the ceremony of marriage the parties lived together in Toronto as man and wife, and two children were

born to them, Joy Adele Welsh, on the 28th November 1930, and Stanley Balfour Welsh, on the 28th March 1932.

According to the plaintiff's evidence, Hilda Bagnall left him in July 1936, but came back to him in September of the same year. She again separated from the plaintiff on 6th March 1938, leaving the children born to the parties with the plaintiff, and she has not lived with him since. The plaintiff states the cause of the separation to be certain differences which had arisen between them with reference to the care and education of the children; the defendant says that the question of the validity of her divorce from her first husband was raised by the plaintiff shortly after her marriage to him, and that that fact, together with certain disputes which arose with respect to this subject, and as to the defendant's son by Bagnall living with them, were the causes of her leaving the plaintiff.

The defendant, by way of counterclaim, claims the custody of the said infant children, Joy and Stanley Welsh, and that the plaintiff be ordered to contribute to their support and maintenance.

The law as to dissolution and annulment of marriage was introduced into Ontario by The Divorce Act (Ontario), 1930, c. 14 of the statutes of Canada, being part of the law of England as it existed on 15th July 1870. A declaration of nullity of marriage is to be distinguished from a divorce, dissolving a valid marriage. A marriage may be declared a nullity when it is void *ab initio*, or when it is voidable only. A person who is already validly married is incapable of contracting a second marriage until the first one has been dissolved either by death or by a valid divorce, and if, before such dissolution, he or she goes through a form or ceremony of marriage with another, the second marriage is void and may be declared a nullity by the Court.

The question at issue in this action, in so far as the claim of the plaintiff is concerned, is whether the marriage of John Bagnall to the defendant Hilda Bagnall in Montreal in the year 1926 was dissolved by the judgment or decree of the court in the State of Florida. The plaintiff contends that the decree of the Florida court did not dissolve the marriage of the defendant Hilda Bagnall with Bagnall, because of the fact that the said defendant was not domiciled in the State of Florida at the time

the proceedings for dissolution of her marriage were commenced there.

The leading case on the question of the domicile of a married woman with respect to dissolution of marriage, is that of *Le Mesurier v. Le Mesurier et al.*, [1895] A.C. 517, in the Judicial Committee of the Privy Council. There, Lord Watson used the words which have been cited in many judgments on this subject, ". . . the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." Viscount Haldane stated the same principle in *Lord Advocate v. Jaffrey et al.*, [1921] 1 A.C. 146, and in that appeal Lord Dunedin said at p. 161, "Now that the domicil of the wife is that of the husband, and follows any change which he makes, even though she is not de facto resident with him, is acknowledged law and not controverted by the appellant." In *Attorney-General for Alberta v. Cook*, [1926] A.C. 444, [1926] 2 D.L.R. 762, [1926] 1 W.W.R. 742, Lord Merrivale, who delivered the judgment of the Judicial Committee, said: "Under British law one of the effects of marriage is to give to the spouses a common domicil—the domicil of the husband. Within the jurisdiction thereby arising, and by the marriage laws to which the spouses are there subject, the claims of either of them to a decree of dissolution of marriage ought to be determined. In so far as British tribunals are concerned it is a requisite of the jurisdiction to dissolve marriage that the defendant in the suit shall be domiciled within the jurisdiction."

A number of years ago an eminent judge of the Divorce Division in England was of the opinion that under certain special circumstances there was an exception to the general rule of the matrimonial domicile. In the case of *Armytage v. Armytage*, [1898] P. 178, Lord Gorell—then Sir Gorell Barnes—stated it to be his opinion that where a wife had been deserted by her husband, the husband could not be allowed in the suit of the wife for dissolution of the marriage to assert he had ceased to be domiciled in England, and later in *Ogden v. Ogden (otherwise Philip)*, [1908] P. 46, the same learned judge expressed the view that in cases where a wife had been deserted in the country of the domicile of her husband, "it has been held that she might sue in the Courts of the country of the domicil," although the husband had left such country intending to acquire a domicile in another country.

This principle of a separate matrimonial domicile on the part of a deserted wife as expressed in the above two mentioned cases, was said in *H. v. H.*, [1928] P. 206, to be an expression of opinion to which effect was not given by the Court and which was not assented to by the Judicial Committee of the Privy Council in *Attorney-General for Alberta v. Cook, supra*. Lord Merrivale, referring, in *H. v. H.*, to this appeal, said that it was "laid down as axiomatic in the jurisdiction in divorce that one of the effects of marriage is to give to the spouses a common domicil in the domicil of the husband; that the jurisdiction to decree dissolution of marriage is the jurisdiction of the country of the domicil; and that it is a requisite of the jurisdiction to dissolve marriage that the defendant in the proceedings should be domiciled in the jurisdiction."

See also *Cromarty v. Cromarty* (1917), 38 O.L.R. 481, 33 D.L.R. 151, affirmed 39 O.L.R. 571.

The Divorce Jurisdiction Act, 1930 (Dom.), c. 15, introduced as an exception to the rule that domicile is considered the test of jurisdiction in cases of dissolution of marriage, the principle expressed by Lord Gorell in the *Armytage* and *Ogden* cases, and the above statute enacted that where a married woman has been deserted by her husband and is living apart from him for a period of two years or more, she may commence proceedings for divorce in the Province where she was domiciled immediately prior to the dissolution.

I find as a fact that John Bagnall, at the time the proceedings for dissolution of his marriage with the said defendant were commenced by her in the State of Florida, was domiciled in the city of Montreal, in the Province of Quebec, where he is still living. Such being the case, and the domicile of the wife being that of the husband, Hilda Bagnall was domiciled in the Province of Quebec when she commenced proceedings for divorce in Florida, and not in the State of Florida. Therefore, applying the principle of law which has just been discussed, the aforesaid marriage could be dissolved only by a tribunal having jurisdiction in the Province of Quebec in such matters, and the only tribunal having such jurisdiction is the Parliament of Canada. It follows, therefore, that at the date of the marriage of the parties in Buffalo, the defendant Hilda Bagnall was still the wife of John Bagnall, although

judicially separated from him, and could not enter into a legal and valid marriage with the plaintiff.

It was argued by counsel for the defendant that the plaintiff could not succeed because he had not proved the law of the Province of Quebec and of the State of Florida, with respect to domicile, and the law of that State as it relates to dissolution of marriage. The judgment in the case of *Leigh v. Leigh*, [1937] O.R. 239, [1937] 1 D.L.R. 773, was cited as authority for this proposition. A perusal of the judgment of Middleton J.A. in that case does not support this contention, which would mean that that learned judge had departed from the rule as to domicile laid down by the Judicial Committee of the Privy Council. The plaintiff wife in that action had always lived in the State of Michigan, and, as was stated in the judgment, it was not certain, but it was probable, that the defendant husband had changed his domicile from Ontario to Michigan. The decree of nullity was sought by reason of bigamy, based not upon domicile but upon residence. The learned judge concluded that some evidence should be given of the law of the States of Michigan and Ohio. These circumstances do not arise in connection with the present case. There is no question but that the domicile of the defendant Hilda Bagnall was in the Province of Quebec at the time she commenced proceedings for dissolution of her marriage in Florida, for that Province was the domicile of her husband John Bagnall.

It was also contended by counsel for the defendant that it was a matter within the discretion of the Court whether a decree should be pronounced declaring void the marriage which is attacked in this action. The argument is based upon a statement made by Middleton J.A. in his judgment in the *Leigh* case, to the effect that the declaratory decree sought in the action is discretionary and not as of right, as no consequential relief is sought or can be sought. It was held in *Grassick v. Grassick*, [1935] O.R. 50, [1935] 1 D.L.R. 351, by Kerwin J., in an action for a declaration that a marriage between the parties celebrated in Ontario was null and void on the ground that the defendant had been previously married in Chicago, that the plaintiff was entitled *ex debito justitiae* to a declaration of nullity, if the evidence warranted it. The judgment in the case of *Bateman v. Bateman (otherwise Harrison)* (1898), 78 L.T. 472, was fol-

lowed. The statement of Middleton J.A. in *Leigh v. Leigh* was not the *ratio decidendi* in that case and was *obiter*.

It is now necessary to consider the counterclaim of the defendant for the custody of the two children, one of whom is almost fourteen and the other of whom is twelve years of age, born to the parties to this action. The status of these children is not altered, whether, if it is a matter of discretion, the declaration requested by the plaintiff in this action is, or is not, granted, if the former marriage of the defendant to John Bagnall was not dissolved before her marriage to the plaintiff. There is no doubt but that the mother of an illegitimate child has a *prima facie* right to its custody. The law with regard to the custody of a child of this status is set out at some length in the very useful judgment of Urquhart J. in *Wong v. Kozevoh et al.*, [1942] O.W.N. 210, affirmed [1942] O.W.N. 536, where the leading cases upon the subject are reviewed by that learned judge. Among the cases discussed by him is that of *Reg. v. Barnardo*, [1891] 1 Q.B. 194, affirmed (*sub nom. Barnardo v. McHugh*), [1891] A.C. 388, where it was said that it had been settled, after some fluctuation of opinion, that the mother of an illegitimate child has a *prima facie* right to its custody up to the age of fourteen in preference either to the reputed father or to any other person, and that the Court will not interfere with this right arbitrarily.

In *Re Jeanes* (1917), 11 O.W.N. 365, Masten J. (afterwards Masten J.A.) stated his opinion of the law with reference to the custody of an illegitimate child to be as follows: ". . . the legal right of the applicant as the mother of the child, which had been fully considered and duly appreciated, must yield to the rule that the best interest of the infant is the first consideration for the Court. That principle may not prevail in all cases, but where, as here, the ability of the mother to support the child and give it a home is at least doubtful, a basis is afforded for the Court to deal with the question on the footing of what is likely to be best for the welfare of the infant."

I think the circumstances here present demonstrate that it would be in the best interest of these infant children to be left in the custody of their father and that their mother should have reasonable access to them. The father is able to give, and is giving them a comfortable home and, I think it may undoubtedly be said, is taking due and proper care of their upbringing and

education. Their mother apparently did not consider the care and welfare of the children when she left them and the plaintiff and her circumstances since that time, and at present, are not, in my opinion, such that it would be in the best interest of the children to be placed in her custody. She is not in a position to take care of them herself and would have to leave them in the control of her brother and his wife.

The Matrimonial Causes Act, 1857 (U.K.), c. 85, and the amendments thereto, did not provide, prior to the year 1873, that a decree pronouncing a marriage null and void should be a decree *nisi*. It was not until the amendment of 1873 (36-37 Vict. c. 31) to the English statute that it was enacted that a decree *nisi* was the form of judgment to be pronounced in actions for annulment as well as in actions for dissolution of marriage. Our Rule 789 requires a decree of annulment of marriage to be a judgment *nisi*.

There will be judgment *nisi* that the marriage solemnized between the plaintiff and the defendant on the 26th December 1929 be declared null and void, by reason of the fact that at the time of the celebration of such marriage the husband of the defendant by a former marriage, which had not been dissolved, was living.

The plaintiff is to have the custody of the children and the defendant shall have the right of reasonable access to them. There will be no costs of the action or counterclaim.

Judgment accordingly.

Solicitors for the plaintiff: Binkley, Harries & Houser, Toronto.

Solicitors for the defendant: Godfrey & Corcoran, Toronto.

[COURT OF APPEAL.]

Rex v. Ross.

Criminal Law—Summary Trials of Indictable Offences—Limitation of Punishment—Attempt to Commit Theft—Immateriality of Value of Property—Automobile—The Criminal Code, R.S.C. 1927, c. 36, ss. 377, 386, 387, 571, 773(b), 778.

The maximum term of imprisonment which may be imposed by a magistrate who convicts, on summary trial, for attempted theft of an automobile, is six months' imprisonment. There is nothing in s. 377 of The Criminal Code, providing for the theft of an automobile, to take the charge of attempting to steal such a vehicle out of the plain words of s. 773(b), and, it being within that clause, s. 778 applies to limit the term of imprisonment which may be imposed.

AN appeal by the accused from his conviction and sentence. The argument is summarized only in so far as it deals with the sentence imposed.

2nd October 1944. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and KELLOCK JJ.A.

Vera L. Parsons, for the accused, appellant: The charge was within the magistrate's absolute jurisdiction, under ss. 773(b) and 774 of The Criminal Code, R.S.C. 1927, c. 36, and the limit of the penalty was therefore, under s. 778, six months. Section 571 has no application: *Rex v. Jobes and Sampson*, 58 N.S.R. 521, 46 C.C.C. 8, [1926] 3 D.L.R. 659. The majority judgment in *Rex v. Blackman and Smith*, 44 B.C.R. 115, [1931] 2 W.W.R. 111, 56 C.C.C. 48, is not sound, and should not be followed. The dissenting judgment of Martin J.A. in that case correctly states the law. See *Smith v. The King; Blackman v. The King*, [1931] S.C.R. 578, 56 C.C.C. 51, [1931] 4 D.L.R. 465.

I refer also to *Rex v. Eldridge*, [1944] 2 W.W.R. 297, 81 C.C.C. 388, and Craies on Statute Law, 4th ed., p. 455.

W. B. Common, K.C., for the Crown, respondent: Theft of a motor vehicle is not simple theft, such as is contemplated by s. 773. It is treated by Parliament, in s. 377, as distinct from any other offence. It follows that an attempt to steal a motor car is in the same position, and that the penalty is governed, not by s. 778, but by s. 387. I rely on the majority judgment in the *Blackman and Smith* case, *supra*.

Vera L. Parsons, in reply.

Cur. adv. vult.

20th October 1944. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the conviction of the appellant by Magistrate MacMillan at Windsor, on the 27th June 1944, on a charge of attempting to steal, from off the public street, a motor vehicle of the value of \$1,400. The appellant also appeals from the sentence imposed of one year definite and one year indeterminate in the reformatory at Burwash.

The Court had no difficulty in reaching the conclusion that the appeal against the conviction could not succeed, and it was dismissed at the close of the argument. The appeal from sentence presented greater difficulty, and judgment was reserved upon it.

The appellant elected to be tried summarily by the magistrate before whom he was charged, and the magistrate proceeded to try him in accordance with his election. It is contended for the appellant that the magistrate, proceeding in this manner, was exercising the jurisdiction conferred upon him by s. 773 of The Criminal Code, R.S.C. 1927, c. 36, and that the charge was one coming within clause (b) of that section. The appellant further contends that s. 778 of The Criminal Code applies, and that the magistrate, on convicting the appellant, could not sentence him to be imprisoned for any term exceeding six months.

If the offence of attempting to steal a motor vehicle comes within clause (b) of s. 773, it is a matter of indifference, I think, for the purposes of this case, whether the magistrate, being a police magistrate, was exercising the jurisdiction conferred upon him by s. 773 or by s. 774. In either case the provisions of s. 778 would apply thereto. (See s. 774, subs. 2). The real matter to be determined would appear to be whether the charge of attempting to steal a motor vehicle is within clause (b) of s. 773. For the appellant it is argued that there is nothing in the Code to limit the plain meaning of the words "attempt to commit theft", and that the appellant was, undoubtedly, charged before the magistrate "with attempt to commit theft". For the Crown it is contended that the punishment for the theft of an automobile or motor car is specially provided for by s. 377, where a minimum sentence of one year's imprisonment is prescribed, and the maximum, by reference in subs. 2 to s. 386, is seven years. This, it is argued, takes the theft of a motor vehicle out of general provisions of the Code as to theft, and the words of s. 773(b) do not include this kind of theft, for which special provision is made.

How the case might be if the charge here was theft of a motor vehicle, it is unnecessary to consider. The charge is of attempting to steal, and attempting to steal a motor vehicle is not dealt with by s. 377, nor does that section prescribe the punishment for attempting to steal a motor vehicle. Section 571 is the section that creates the offence of attempting to steal a motor vehicle, with which the appellant was charged, and of which he has been convicted. Section 571 also provides the punishment for the "attempts" that come within it. That section is as follows:

"571. Every one who attempts to commit any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision is made by law for the punishment of such attempt, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence attempted to be committed may be sentenced."

It is to be noted that the words of the section are precise, and that it applies where "no express provision is made by law for the punishment of *such attempt*". Neither s. 377 nor s. 386, to which counsel for the Crown points, contains any express provision for the punishment of an attempt to steal a motor vehicle.

I am unable, therefore, to see any ground for refusing, in this case, to give to the words of s. 773(b) their plain meaning, and to apply them where the article attempted to be stolen is a motor vehicle. Effect must, therefore, be given to the limitation fixed by s. 778 upon the term of imprisonment. The period of one year definite must be reduced to six months, to run from the date of conviction. The further indeterminate period of one year is not affected by the matters under discussion, and it will stand (see s. 20 of An Act to Amend the Criminal Code, c. 30 of the statutes of 1939).

Sentence reduced.

Solicitors for the accused, appellant: Horkins, Graham & Parsons, Toronto.

Solicitor for the Crown, respondent: C. L. Snyder, Toronto.

[COURT OF APPEAL.]

King et al. v. Flanigan.

Limitation of Actions—Interruption of Running of Statute—Payment on Account, with Promise to Make further Payments—Payment and Promise Made by Mortgagor's Wife—Authority of Wife to Bind Mortgagor—Holding-out—The Limitations Act, R.S.O. 1937, c. 118, s. 23(1).

By a mortgage made in 1931, the defendant covenanted to make half-yearly payments of principal and interest, and the mortgage contained an acceleration clause providing that in default of any payment the whole principal should, at the option of the mortgagee, become payable forthwith. Default occurred in 1932. In June 1943 the executors of the mortgagee brought an action on the mortgage, and the defendant pleaded The Limitations Act as a defence. The plaintiffs set up, as an answer to this plea, a payment on account made by the defendant's wife in December 1933, with a request to the mortgagee to accept further payments of \$10 per month. After the trial, the trial judge delivered written reasons in which he held that the evidence has failed to establish this payment of December 1933, and that, by the operation of the acceleration clause, the whole principal had become due on the first default in 1932, with the result that when the writ was issued the claim was statute-barred. After the delivery of these reasons, but before the entry of judgment, the plaintiffs discovered a letter from the defendant's wife to the mortgagee, dated 1st December 1933, stating that a payment of \$10 on account was enclosed, and asking permission to make further monthly payments of a like amount. The trial judge granted an application for permission to re-open the case, and, being of opinion that this letter had been proved to be in the handwriting of the defendant's wife, and that it was further proved that the payment of \$10 had in fact been made with it, he withdrew his earlier reasons and gave judgment for the plaintiffs. The defendant appealed.

Held, the appeal must be dismissed. In the circumstances, the trial judge had jurisdiction to permit the re-opening of the case. *Rathbone v. Michael* (1910), 20 O.L.R. 503, applied; *McNiven v. Pigott* (1914), 31 O.L.R. 365, distinguished. Although the plaintiffs had not proved any express authority from the defendant to his wife to write the letter of 1st December 1933, nevertheless, in the circumstances of the case, he was bound by the letter, and the running of the statute was interrupted by the payment.

Per Robertson C.J.O.: Although the evidence would not justify an affirmative finding that the plaintiffs had proved authority from the defendant to write the letter, or to make the payment of \$10, it did establish a holding-out by the defendant to the plaintiffs of his wife as his agent generally to act for him in respect of the mortgage. The \$10 was undoubtedly his money. *Anderson v. Sanderson* (1817), 2 Stark. 204; *Emerson v. Blonden* (1794), 1 Esp. 142, referred to.

Per Gillanders J.A.: The general authority admittedly given by the defendant to his wife, to write letters on behalf of her husband acknowledging the debt and promising to pay it, should be found to have continued up to the writing of the letter of December 1933, and the reasonable construction of the evidence was that in writing this letter the wife acted as agent for the defendant.

Per Kellock J.A.: The correct conclusion on the evidence seemed to be that the authority originally given to the wife by the defendant, to answer letters respecting the mortgage, extended to the letter of December 1933, and that that authority was never withdrawn. In any event the defendant put forward his wife to the mortgagee as his agent to deal with the mortgagee, without notifying the latter of any limitation upon or withdrawal of that authority.

AN appeal by the defendant from the judgment of Barlow J., *infra*, in favour of the plaintiffs, in an action upon a mortgage.

20th January 1944. The action was tried by BARLOW J. without a jury at Toronto.

D. H. Porter, and Eileen Mitchell, for the plaintiffs.

D. Goldstick, for the defendant.

28th January 1944. BARLOW J.:—An action for foreclosure and on the covenant in a certain mortgage.

The plaintiffs are the executors of the estate of Fannie Elizabeth King, who was the executrix of the estate of William A. King, who in turn was the mortgagee of a certain mortgage made by the defendant as mortgagor, which mortgage is dated the 29th day of June 1931, and was made to secure the sum of \$1,100 with interest at 8 per cent., payable \$25 half-yearly on the 15th day of November 1931, and on the 15th days of May and November in each of the years 1932, 1933, 1934, and 1935, with the balance becoming due and payable on the 25th day of May 1936, with interest payable on the same days.

The writ of summons was issued on the 7th day of June 1943. The plaintiffs allege that a payment of \$10 on account of the said mortgage was received by them from the defendant on 5th December 1933. The defendant alleges that no such payment was made and that the plaintiffs' claim is barred by the Statute of Limitations, and pleads The Limitations Act, R.S.O. 1937, c. 118, and amendments.

Where a defendant pleads the Statute of Limitations the onus is on the plaintiff to prove that his debt is not barred by the statute.

The mortgagee William A. King died on 22nd April 1932, and appointed his wife Fannie Elizabeth King as his executrix. As such she made the collections on this and other securities held by the mortgagee.

Evidence was given by one Smyth, a son-in-law of Fannie Elizabeth King. His evidence shows that, while Fannie Elizabeth King made the collections, he was accustomed to go to her house, obtain the payments which she had received, and deposit the same in the bank. He produces a duplicate deposit slip, Ex. 5, showing, on 4th December 1933, among other deposits, an entry "Flanigan, 45 Lesmount \$10.00." The only knowledge that he has of this is that the same was given to him by Fannie

Elizabeth King as being a payment on the mortgage in question in this action. This, in my opinion, is not such evidence as can be accepted, or such evidence as will satisfy the onus placed on the plaintiffs. The entry was made by Smyth, who obtained the information from Fannie Elizabeth King, the executrix of her husband's estate, and is at best hearsay evidence. The entry raises no presumption as to its truth. See *Jones v. Smith* (1932), 4 M.P.R. 520, where, in an action upon an "I.O.U." and on a promissory note, the defendant pleaded the Statute of Limitations, and it was held that the burden was on the plaintiff to prove satisfactorily that there was a payment on his claim in order to take it out of the statute and that he must do so clearly and without any equivocation.

I must, therefore, find that the plaintiffs have not satisfied the onus with respect to the \$10 payment in question.

The same applies to a \$20 payment alleged by the plaintiffs to have been made on 21st May 1933. The defendant's motion for a non-suit therefore succeeds, subject to the plaintiff's contention that the words "at the option of the mortgagee" in the acceleration clause in the mortgage contract should be interpreted to mean that until the mortgagee has exercised this option and demanded payment the acceleration clause does not operate to make the principal payable forthwith and that since the due date of the mortgage falls within the limitation period of ten years the plaintiffs are entitled to recover all principal and interest falling due within the limitation period.

I cannot agree with this contention. The acceleration clause is as follows: "Provided that in default of payment of the interest (or any part of the principal) hereby secured the principal hereby secured shall (at the option of the Mortgagee) become payable forthwith."

There was default in payment of both interest and principal prior to 7th June 1933. The acceleration clause, in my opinion, means that the whole principal falls due upon default in payment of principal or interest, and the mortgagee may sue for the same or may refuse to accept payment if and when the same is offered by the mortgagor. Section 23 of The Limitations Act is as follows:

"23.—(1) No action shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of such land or rent,

or to recover any legacy, whether it is or is not charged upon land, but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money or some interest thereon has been paid, or some acknowledgment in writing of the right thereto signed by the person by whom the same is payable, or his agent, has been given to the person entitled thereto or his agent, and in such case no action shall be brought but within ten years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was made or given."

To use the words of the above section "a present right to receive the same [has] accrued" to the mortgagee, and even though a present right to receive the same has accrued, the mortgagee may at his option refuse to accept payment. This option to refuse to accept payment, however, does not affect the commencement of the running of the limitation period. It has been held in *In re Pardoe; McLaughlin v. Penny*, [1906] 1 Ch. 265, that the phrase "a present right to receive the same" means a right to recover by legal proceedings. Under the acceleration clause the mortgagee has a right to recover all of the principal by legal proceedings immediately default has been made. This being so, his option does not affect the commencement of the running of the limitation period. Furthermore in *Hornsey Local Board v. Monarch Investment Building Society* (1889), 24 Q.B.D. 1 at 5, Lord Esher M.R. holds that the words "present right to receive the same" do not need to be interpreted as a right to recover by legal proceedings to give a time for the commencement of the running of the statute. He holds that all that is necessary is a present right to receive the money which has "accrued to some person capable of giving a discharge for, or release of the same." In my opinion, the acceleration clause in the mortgage means that there has accrued to the mortgagee a present right to receive the mortgage money, and immediately this right accrues the limitation period commences to run. *Reeves v. Butcher*, [1891] 2 Q.B. 509, follows the earlier case of *Hemp v. Garland* (1843), 4 Q.B. 519 and holds that the Statute of Limitations runs from the earliest time at which an action could be brought. This case is distinctly in point. The agreement gave a right to sue at the end of five years, with an option in certain events to call the money in sooner. This right

accrued before the end of the five years. The Court held that the Statute of Limitations commenced to run immediately after default was made in payment of the first quarterly instalment of interest. In *McFadden v. Brandon* (1904), 8 O.L.R. 610, Mac-lennan J.A., says, in interpreting an acceleration clause in a mortgage, at p. 612:

"It is true that, by virtue of the proviso, the defendant could, if the action had been brought before the expiration of five years, have had relief against that action on payment of arrears; but even if he had done that it could not be said that a cause of action for the principal money had not arisen. For the plaintiff it was suggested that the acceleration clause merely gave him *an option* to claim payment before the expiration of the five years, which had never been exercised. But that does not remove the difficulty, which is that a cause of action arose at the end of the first year. It is always optional with a plaintiff to bring any action which may have arisen to him." It was held that the Statute of Limitations began to run immediately default occurred.

See also *Cameron v. Smith* (1913), 4 O.W.N. 1459, 24 O.W.R. 767, 12 D.L.R. 64; *Drummond-Hay v. Birchard*, 49 Man. R. 185, [1941] 3 W.W.R. 213, [1941] 4 D.L.R. 36.

On behalf of the plaintiffs it is contended that *North American Life Assurance Co. v. Johnson*; *Linton v. Johnson*, [1940] O.R. 522, [1940] 4 D.L.R. 496, puts a different interpretation upon an acceleration clause in a mortgage. I cannot so find. Any reference to the acceleration clause is *obiter* and is quite unnecessary for the decision. It is quite evident that the question arising in the case at bar was not considered either by the Chief Justice at the trial or in the Court of Appeal.

I must, therefore, find that the mortgage claim is statute barred. The action will be dismissed with costs.

After the delivery of the above reasons, but before the entry of the formal judgment, a motion was made on behalf of the plaintiffs for "leave to have the within action re-opened for hearing in order that evidence which has become available since the trial of the action may be admitted and in order that the parties hereto may be examined thereon". Leave was granted.

15th May 1944. The trial was continued before BARLOW J.
Eileen Mitchell, for the plaintiffs.

Iva S. Goldstick, for the defendant.

19th May 1944. BARLOW J.:—On the 28th day of January 1944, pursuant to reasons for judgment, I endorsed the record in this action "Judgment to go dismissing action with costs". The formal judgment not having been settled and entered, the plaintiffs made an application for leave to introduce further evidence. On 4th April 1944, I granted the plaintiffs' application and fixed the 15th day of May 1944 to hear further evidence. The plaintiffs' claim in the action is for the amount due under a certain mortgage, for foreclosure of the mortgage and for possession.

The evidence now adduced discloses that subsequent to the trial the plaintiffs found among the papers of the late Fannie Elizabeth King the following letter:

"Dec 1st 1933

45 Lesmount Ave
Toronto 6 Ont

"Mrs. King

"Palmerston Blvd

"Toronto

"Dear Mrs King,

"I am very sorry that it has been necessary for you, to have to send me a 'final notice' in regards to my obligation to you. I am enclosing \$10.00 and I beg of you to please accept monthly payments of \$10.00 until I am straight with you, in regard my taxes, I am paying these also as best I can. I have an arrangement to pay them also in small payments.

"All this inability to pay is no fault of mine. A series of wage cuts and getting further & further into the hole until I am almost out of my mind, is responsible. I know too Mrs. King, that you also are feeling the effects of all this, and I ask you once again to allow me to pay you in monthly payments, because if we were to be put out of this small home I don't know what I would do. Awaiting a favorable reply

"I remain Yours Truly

"Mrs. J. Flanigan"

No. 45 Lesmount Avenue is the house address of the property covered by the mortgage in question in this action. At the original trial, evidence was given by Arthur Rolph Smyth, who

was keeping Mrs. King's accounts and depositing in the bank moneys received by her from time to time. The evidence given and the records produced show that a deposit of \$10 was made in the bank on 5th December 1933, and that the \$10 payment was recorded as having been a payment made on account of the Flanigan mortgage on Lesmount Avenue. I did not consider that this evidence was sufficient to take the case out of the Statute of Limitations pleaded by the defendants. The above letter, which has now been found and is produced at this hearing, is the best evidence that the \$10 payment was made on or about the 1st day of December 1933. The receipt of the said payment by Mrs. King is corroborated by the evidence of Arthur Rolph Smyth.

Upon the original trial of the action two letters, Exhibits 6 and 7, written by Mrs. J. Flanigan to Mrs. King, were produced and identified by the defendant Flanigan as his wife's handwriting. Furthermore, the defendant Flanigan says in his evidence that his wife was instructed to answer letters from the King estate demanding payment of the mortgage, and that any money paid on the mortgage came from him as his wife did not have any money.

I have compared the writing in the letter of 1st December 1933, with the letters Exhibits 6 and 7, and without doubt all three letters were written by the same person, *viz.*, Mrs. J. Flanigan. I must, therefore, find upon the evidence adduced that a payment of \$10 was made on account of the mortgage in question in this action on or about the 1st day of December 1933.

This action was commenced on 7th June 1943. As the above payment was made within the ten-year period prior to 7th June 1943, the Statute of Limitations fails as a defence to the action. The endorsement on the record will be cancelled and judgment will go for the plaintiffs:

(1) for a reference to the Master to make all necessary inquiries, to take the accounts, and to ascertain what amount is due to the plaintiffs on the mortgage in question;

(2) for immediate payment of the amount so found due to the plaintiffs by the Master;

(3) for foreclosure with the usual time for redemption;

(4) for possession;

(5) for costs.

Judgment accordingly.

3rd and 4th October 1944. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and KELLOCK J.J.A.

Benjamin Laker, for the defendant, appellant: There was no agency established. Before the payment by the wife can bind her husband, the mortgagor, she must be his authorized agent. A payment by the wife, on account of a mortgage to which she is not a party, is not a payment made by a person liable to pay so as to prevent the running of the Statute of Limitations: *Newbould v. Smith* (1886), 33 Ch. D. 127. It was said in *Harlock v. Ashberry* (1882), 19 Ch. D. 539, that the "underlying principle of all the Statutes of Limitation is, that a payment to take a case out of the statute must be a payment by a person liable, as an acknowledgment of right". The wife not being a party bound to pay, a payment by her could not amount to a promise in fact on the part of the defendant to pay: *Buckley v. Taylor*, 45 Man. R. 232, [1937] 2 W.W.R. 663. A husband who had authority from his wife to collect rents for her and apply the same as he saw fit, either for his own or her benefit, could not bind the wife on a joint promissory note by his payment without her knowledge or consent: *Harris v. Greenwood* (1904), 9 O.L.R. 25. In the case at bar, the appellant had no knowledge, nor did he consent to payment by his wife; he did not authorize it. A letter written by his wife at his request stated that no moneys could be paid. That was the only authority given to his wife. The respondents have not satisfied the onus, which is theirs, of establishing a case of agency. An acknowledgment of debt made by a party not liable on the debt must be made with the authority of the person who is liable. Unless the respondents have established agency in fact, then the whole foundation is gone. No one can make a promise for another unless there is agency.

Judgment once having been given is binding from the date of its pronouncement: *McNiven v. Pigott* (1914), 31 O.L.R. 365, 19 D.L.R. 846.

The appellant having been successful at the trial in the first instance, costs ought to have been awarded him: *London Loan Assets Ltd. et al. v. Morine et al.*, [1933] O.R. 65, [1933] 1 D.L.R. 366.

Eileen Mitchell, for the plaintiffs, respondents: The trial judge was correct in allowing further evidence to be submitted

after judgment, but before such judgment was perfected: *Rathbone v. Michael* (1910), 20 O.L.R. 503.

The evidence discloses sufficient grounds for finding authority in the wife to write an acknowledgment and make part payments. [ROBERTSON C.J.O.: Do you concede that the burden of proof is on you? You must prove that a payment was made by the mortgagor or with his authority and in such circumstances that there was an implied promise to make further payments.] There was a course of dealing and conduct with the wife which clearly established agency on behalf of her husband. [ROBERTSON C.J.O.: The real question is whether there is evidence here that the wife had authority to make promises of payment which would be binding upon her husband.]

This mortgage contained the words "at the option of the mortgagee" in the acceleration clause. In *North American Life Assurance Co. v. Johnson; Linton v. Johnson*, [1940] O.R. 522, [1940] 4 D.L.R. 496, it was held that these words had a definite meaning to which effect must be given. The mortgagee not having exercised his option, the mortgage became due and payable only from the date of maturity mentioned therein, and the Statute of Limitations should run from that time.

Benjamin Laker, in reply: An acceleration clause is exactly that. It accelerates the time for payment. Counsel for the respondents admitted that on the occasion of the first default, they could have brought an action. It is from the time that the cause of action arose that the period of limitation commences to run.

There is not sufficient evidence to show a course of dealings with the wife of the mortgagor. There was no authority in the first place given to the wife—there was no authority in fact. In the trial judge's reasons for judgment, the question whether or not an agency was established was not considered at all. We ask this Court to allow our appeal with costs both here and below.

Cur. adv. vult.

23rd October 1944. ROBERTSON C.J.O.:—This is an appeal from the judgment of Barlow J., dated 19th May 1944, after the trial of the action before him without a jury, at Toronto.

The matter principally at issue is whether the claim of the respondents, who are the plaintiffs in the action, is barred by

The Limitations Act, R.S.O. 1937, c. 118. The action was brought to recover the amount of principal and interest owing on a mortgage, and, in default of payment, for foreclosure and for possession of the mortgaged lands. The respondents as an answer to the plea setting up The Limitations Act, R.S.O. 1937, c. 118, rely mainly upon a letter, dated 1st December 1933, written by the wife of the appellant, enclosing a payment of \$10 on account, and requesting the respondents to accept monthly payments of \$10 on the mortgage debt.

The mortgage was dated the 29th June 1931 and fell in arrear in the following year. The action was commenced on the 7th June 1943. The letter of 1st December 1933, with the payment of \$10 that was enclosed, would suffice to take the case out of The Limitations Act, if agency on the part of the wife of the mortgagor is established.

The learned trial judge appears to have been satisfied that the evidence adduced affirmatively established the authority of the mortgagor's wife to write the letter and to make the payment on his behalf and on his account. I must confess that I have not been wholly satisfied that the evidence goes far enough to support an affirmative finding that the respondents have proved authority from the mortgagor to write this letter, or to make the payment of \$10. I am, however, inclined to the view that the evidence does establish a holding-out to the respondents, by the appellant, of his wife as his agent generally to act for him in respect of his mortgage. The \$10 paid was, undoubtedly, the mortgagor's money, and while he may not have authorized either the making of the payment or the writing of the particular letter, in my opinion his conduct prior thereto was such as to entitle the respondents to regard both the making of the payment and the sending of the letter as acts done by his wife as his agent. Upon this ground, therefore, I concur in the dismissal of the appeal, with costs. I refer to *Anderson v. Sanderson* (1817), 2 Stark. 204, 171 E.R. 621; *Emerson v. Blonden* (1794), 1 Esp. 142, 170 E.R. 306.

GILLANDERS J.A.:—The issue raised in this appeal is whether or not, under the circumstances here, action on the mortgage made by the appellant (defendant) is barred by the Statute of Limitations.

The mortgage in question was made on 29th June 1931, and provided for half-yearly payments of principal until 15th May 1936, when the balance secured became due and payable, with interest in the meantime payable on the same days as the principal payments.

The mortgage contained an acceleration clause as follows: "Provided that in default of payment of the interest (or any part of the principal) hereby secured the principal hereby secured shall (at the option of the mortgagee) become payable forthwith."

The writ in the action was issued on 7th June 1943.

When the action came on for trial, the contest seems to have turned on two points (1) the respondents (plaintiffs) contended that a payment of \$10 had been made on or about 4th December 1933, which gave a new starting point for the running of the statute, and (2) in any event the amounts payable on the various payment dates (including the balance payable on maturity of the mortgage on 15th May 1936) falling within the ten year period prior to the issue of the writ, were not barred.

The trial judge disposed of the issues in favour of the appellant (defendant), finding in his written reasons, reported in [1944] O.W.N. 105 and [1944] 1 D.L.R. 685, in respect of the alleged payment made in December 1933, that the respondents (plaintiffs) had not by proper evidence satisfied the onus of proving this payment, and that the effect of the acceleration clause was that the statute ran in favour of the defendant from the time of the first default in respect of all moneys secured and unpaid.

Subsequently, but before judgment had been issued, on the application of the respondents, he re-opened the trial to take further evidence. This was done on an affidavit indicating that although diligent search had been made before trial, a letter had subsequently been discovered showing that the payment of \$10 had been made on or about 1st December 1933.

After taking further evidence, the learned trial judge held this letter, with the evidence previously given, sufficient to establish that the payment of \$10 had in fact been made; and that the Statute of Limitations did not, therefore, provide a defence, and he gave judgment for the respondents (plaintiffs).

The defendant appeals.

Counsel for the appellant, in his careful argument, urges that the trial judge had no jurisdiction to re-open the case after he had given judgment, and that any further relief sought by the respondents should have been obtained by way of appeal. He relies on *McNiven v. Pigott* (1914), 31 O.L.R. 365, 19 D.L.R. 846.

It should be noted that in the case at bar, at the time of the application to re-open, in addition to the fact that the judgment had not been issued, the parties had not acted upon it or changed their position in consequence thereof, nor is there any suggestion of bad faith.

Having regard to the course of the trial, the question whether or not this disputed payment was made was considered highly important. Under these circumstances, the re-opening of the case was justified: *Rathbone v. Michael* (1910), 20 O.L.R. 503.

It is convenient next to refer to the effect of the acceleration clause. I had occasion to consider this question in the case of *Andre v. Valade*, [1944] O.R. 257, [1944] 2 D.L.R. 454. It is unnecessary to re-state here the reasons there given for holding that in my opinion the effect of this clause is to start the statute running against the plaintiff on the first default in respect of all moneys secured by the mortgage and unpaid.

Although it apparently was not pressed upon the trial judge, the main point argued before us on the appeal was that even if the disputed payment of \$10 was made as alleged, it was not established that any payment, or acknowledgment and promise of payment, was made by the mortgagor or his authorized agent in that behalf. This narrows down to the question whether or not the mortgagor's wife was his agent to make the payment or to give an acknowledgment and promise on his behalf.

The onus lay on the respondents to establish affirmatively either that their cause of action arose within the statutory period or that it had been kept alive by the act of the appellant or his agent. If they seek to establish liability through the act of the agent, it is a necessary ingredient of their case to prove the agency.

In the circumstances here it is of no importance in considering the question of agency that the parties are husband and wife. The mere fact of marriage has no effect in making the wife the agent of her husband, except in special circumstances

where she becomes an agent of necessity: *Debenham v. Mellon* (1880), 6 App. Cas. 24.

The relevant evidence is brief and for the most part in the testimony of the appellant himself. His wife was not a witness. He testified that only one payment had been made on the mortgage, that is the first one falling due in 1931; that he had made no further payments because he had suffered two drastic reductions in wages and finally his employer went out of business and he had been on relief for a time. In cross-examination he testified in part as follows:

"Q. From time to time you received letters, did you not, from the King estate requesting payment of the money? A. Yes, and my wife was instructed by me to answer those letters.

"Q. Your wife did answer some letters? A. I believe she did.

"Q. How long did that go on, that is your wife answered letters demanding payment, from the King estate? A. A couple of years, I could not just remember how many letters were received and how many letters were answered.

"Q. You kept receiving letters for about a couple of years? A. Not all the time, I think there were two letters received to the best of my knowledge, I could not say definitely.

"Q. Did your wife answer those two letters? A. She answered one.

"Q. Have you any way of telling when that letter was written? A. No.

"Q. I will just show you a letter and see whether you recognize the handwriting of this letter? A. Yes, that is my wife's handwriting."

He subsequently admits that an undated letter produced to him written by his wife was written on his authority in connection with this mortgage. This letter reads as follows: "Dear Mrs. King: I am sorry to have kept you waiting for your payment. I have been waiting for the money to pay you to come from my Insurance Policies, but they delay so much but they surely will be here within a few days and Mrs. King as soon as ever the money arrives I will be right to you with it. I hope you will not be inconvenienced by this delay, believe me to be yours truly, Mrs. J. Flanigan."

He was later shown a letter signed by his wife dated 17th May, which he identifies as being in his wife's handwriting,

purporting to enclose \$20 "interest on our Mortgage", expressing regret at being unable to send the full amount, stating that her husband was working at half wages, "but I will endeavour to send you more on June 2nd." The appellant testified that he had no knowledge of the payment mentioned, or of his wife writing the letter, but that if his wife did pay the \$20 it must have been his money since she had no money of her own.

The letter of 1st December 1933, again from the appellant's wife, put in after the trial was re-opened, states in part, "I am very sorry that it has been necessary for you, to have to send me a 'final notice,' in regards to my obligation to you." The letter purports to enclose \$10 and requests that monthly payments be accepted "until I am straight with you".

While it seems clear that no specific authority to the wife to make payments on the mortgage can be found, the matter of her authority to write on behalf of her husband in terms acknowledging the debt and promising to pay is not, I think, in the same plight. It is true that affirmative evidence of the wife's agency must be found, but the authority here admittedly given by the appellant to his wife should under the circumstances be given a reasonable construction and not viewed too narrowly or strictly. It is urged that this was limited to merely answering letters and advising that he could not pay. The only letter written by the wife which the appellant admits authorizing in effect acknowledges the debt and contains a promise to pay. The important letter of 1st December 1933, purports to be in response to a "final notice". It seems reasonable to hold that the wife was still clothed with whatever authority she had been given. This letter is clear acknowledgment of the debt and asks again to be allowed to pay in monthly instalments. The reasonable construction of the evidence is that in writing this letter she did so as agent for her husband.

The appeal must be dismissed with costs.

KELLOCK J.A.: I have had the advantage of perusing the reasons for judgment of my Lord and my brother Gillanders, and I concur in their conclusion that this appeal should be dismissed.

As to the point raised that the learned trial judge was not entitled to re-open the case after he had given judgment, I think, in the circumstances of this case, that the learned trial judge

was so justified, and that the point is governed by the decision in *Rathbone v. Michael* (1910), 20 O.L.R. 503.

The main point argued on the appeal was in connection with a letter dated 1st December 1933, written by the appellant's wife, and the payment of \$10 enclosed therewith. If the correct conclusion on the evidence be that this letter and this payment are binding upon the appellant, the defence of the Statute of Limitations fails. In the cross-examination of the appellant the following appears [see *supra*, p. 549].

The appellant identified an undated letter which he said was written in the winter of 1933, which would be during the months of January, February or March of that year. This letter reads [see *supra*, p. 549].

The appellant admits that this letter was written by his wife, with his authority, with relation to the mortgage in question. He says he had surrendered some life insurance, and that this letter was written close to the time that this had taken place.

Another letter, dated 17th May, without giving the year, was produced by the respondents, and was identified by the appellant as having been written by his wife. This letter reads:—
“Dear Mrs. King:

“Enclosed is \$20., interest on our Mortgage. I am sorry I cannot send you the full amount at once. My husband is working half wages, but I will endeavour to send you more on June 2nd. Hoping this wont inconvenience you too much, I remain Yours truly,

(Sgd.) “Mrs. J. Flanigan.”

This letter would appear to have been written in the year 1933, as the appellant stated that he was working on reduced wages at this time, a reduction having occurred some time in 1932, and a further reduction in the early part of 1933. The appellant also admitted that this letter could only refer to the mortgage in question, and while he had no knowledge of the payment to which it referred, he stated that his wife had no money beyond what she obtained from him, and that this money might have come from the surrender of the life insurance.

The letter of 1st December 1933 is also addressed to Mrs. King, and reads as follows:

"Dear Mrs. King:

"I am very sorry that it has been necessary for you to have to send me a 'final notice' in regards to my obligation to you. I am enclosing \$10.00 and I beg of you to please accept monthly payments of \$10.00 until I am straight with you, in regards to my taxes, I am paying those also as best I can. I have an arrangement to pay them also in small payments.

"All this inability to pay is no fault of mine. A series of wage cuts and getting further & further into the hole until I am almost out of my mind, is responsible. I know too Mrs. King, that you also are feeling the effects of all this, and I ask you once again to allow me to pay you in monthly payments because if we were put out of this small house I don't know what I would do. Awaiting a favourable reply.

"I remain Yours truly,

(Sgd.) "Mrs. J. Flanigan."

This letter was not found until after the original judgment had been given, and accordingly the appellant was not cross-examined with regard to it. The trial judge was satisfied that the letter was in the handwriting of the appellant's wife, and this is not disputed. While the appellant denies that \$10 was ever paid in December of 1933, this payment was established, but the appellant's denial of any knowledge of it still stands. Notwithstanding, however, I think that the correct conclusion on the evidence is that the authority originally given to the wife by the appellant, to answer letters requesting payment of the mortgage moneys, extended to the later letters of May and December 1933, and that that authority was never withdrawn. In any event the appellant put forward his wife to the mortgagee as his agent to deal with the mortgagee with respect to the mortgage without notifying the latter of any limitation upon or withdrawal of that authority. Consequently the letter of 1st December 1933, and the payment enclosed, are binding upon the appellant and displace the defence of the Statute of Limitations.

I, therefore, concur in the dismissal of the appeal with costs. I do not think it necessary to deal with the respective contentions of the parties with respect to the effect in law of the acceleration clause in the mortgage, but I am content to assume, without deciding the point, that the respondents' cause of action arose

at the time when action could first have been brought against the appellant on the mortgage.

Appeal dismissed with costs.

Solicitors for the plaintiffs, respondents: Fennell, Porter & Davis, Toronto.

Solicitor for the defendant, appellant: Iva S. Goldstick, Toronto.

[COURT OF APPEAL.]

Holmes v. Knight and Aubin; Smith v. Holmes and Place.

Barristers and Solicitors—Authority to Bind Client—Undertaking by Counsel Not to Appeal—Circumstances of Giving—Failure to Obtain Authority from One of Two Clients—Mistake or Inadvertence—Consent to Withdrawal of Undertaking.

After the delivery of the jury's verdict at the second trial of an action, a question arose as to the disposition of the costs of the earlier abortive trial, which costs had, by the Court of Appeal, been left to be disposed of by the judge presiding at the new trial. Counsel for the successful parties stated that if the other side would undertake not to appeal he would forego all costs except those of the second trial. Counsel for the unsuccessful parties, S. and K., asked permission to consult his clients. He then withdrew, and returned in a few minutes to the court room and gave his undertaking not to appeal. Judgment was then delivered by the trial judge. Later on the same evening, counsel realized that he had obtained authority only from K., and that he had forgotten to consult S. On the following morning he communicated with senior counsel in an endeavour to withdraw his undertaking, but the undertaking was not withdrawn in court or before the trial judge on the settlement of the judgment. S. served a notice of appeal, and the respondents took a preliminary objection, based upon the undertaking not to appeal.

Held, the preliminary objection should be overruled, and the appeal should be allowed to proceed, but on condition that the appellant consented to the giving of leave by the trial judge to the respondent to cross-appeal on the question of the costs of the first trial.

Per Robertson C.J.O.: The Court has always distinguished between an undertaking given by counsel under the instructions of his client, and one given without such instructions, where, as in this case, the undertaking was given by counsel without consulting his client, and by inadvertence; there was no authority that prevented the Court from relieving against the undertaking in the second of these cases, provided it appeared that it was really through inadvertence that the undertaking was given without specific instructions.

Per Gillanders J.A.: It was clear from the circumstances that counsel had intended to give the undertaking only with his clients' express authority, and had not purported to give it in pursuance of his general authority as counsel. Since his failure to obtain the authority of one of his clients clearly arose from mistake or inadvertence, he should be permitted by the Court to withdraw it, on terms. *Harvey v. Croydon Union Rural Sanitary Authority* (1884), 26 Ch. D. 249, applied; *In re Hull and County Bank; Trotter's Claim* (1879), 13 Ch. D. 261, distinguished.

Per Laidlaw J.A.: Counsel did not need the express authority of his clients to give the undertaking, since his general authority as counsel permitted him to compromise, and this included an undertaking not

to appeal. *In re West Devon Great Consols Mine* (1888), 38 Ch. D. 51; *Chown et al. v. Parrott et al.* (1863), 14 C.B.N.S. 74; *Prestwich et al. v. Poley* (1865), 18 C.B.N.S. 806, applied. The client was accordingly bound by the undertaking. *Bailey v. Bailey*, 2 Chy. Chrs. 57, applied. It made no difference that the undertaking was not recited in the formal judgment, or noted in the trial judge's endorsement on the record, though such a recital or notation would have been desirable. The facts did not disclose any mistake or misapprehension upon which the Court could properly say that the consenting party should not be bound. But the same principle which gave counsel authority to bind his client in this way also enabled him, on his client's behalf, to consent to a release from an undertaking given by the opposite party, and, in the circumstances here disclosed, it should be held that senior counsel for the respondents had consented to release the appellant's counsel from the undertaking he had given. This release bound his client, and, with the consent and approval of the Court, which should now be given, completely freed the appellant from the undertaking.

AN argument upon a preliminary objection to an appeal, based upon the fact that the appellant's counsel, at the trial, had undertaken not to appeal. (NOTE: The appellant was Mrs. Smith, described in one of the actions by her maiden name, Miss Aubin).

12th October 1944. The argument was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW J.J.A.

J. W. Pickup, K.C. (R. E. Nourse with him), for the appellant: An undertaking, to be enforceable, must be contained in the final order of the Court: *In re Hull and County Bank; Trotter's Claim* (1879), 13 Ch. D. 261. This was an undertaking, not a contract. It was given to the Court, and it is for the Court to say whether or not it is binding. In view of the circumstances, we ask that this Court relieve the appellant from the undertaking, in so far as it applies to her, and permit her appeal to be heard. Counsel left the court room for the purpose of consulting both Knight and the appellant. Knight was in favour of giving the undertaking on the terms suggested, and counsel inadvertently omitted to discuss the matter with the present appellant. He communicated with opposing counsel on the following morning, and the undertaking was repudiated before judgment was entered. In such circumstances, error having been made, the undertaking should not be enforced: *Brown v. Blackwell* (1876), 26 U.C.C.P. 43 at 46; *Harvey v. Croydon Union Rural Sanitary Authority* (1884), 26 Ch. D. 249. [LAIDLAW J.A.: What was the mistake in the case at bar?] The failure to consult the second client, who, as it later transpired, was the only one interested in an appeal. [LAIDLAW J.A.: That may be a very negligent act, but is it a mistake?]

E. L. Haines (J. M. Simpson, K.C. with him), for the respondents: The undertaking binds the appellant, and precludes an appeal. It was within the duties and responsibilities of counsel to give such an undertaking, and his clients must be bound by it: *Re Solicitor; Re Williams v. Swan and Gray Coach Lines, Limited*, [1942] O.R. 604, [1942] 4 D.L.R. 488; *In re West Devon Great Consols Mine* (1888), 38 Ch. D. 51; *Caswell v. Toronto R. W. Co.* (1911), 24 O.L.R. 339.

Cur. adv. vult.

23rd October 1944. ROBERTSON C.J.O.:—I have had the advantage of reading the reasons for judgment of both my brethren Gillanders and Laidlaw.

I agree that in the circumstances of this case the client should not be held to the undertaking not to appeal, given by counsel on her behalf, but without consulting with her. I do not think it necessary to discuss the numerous authorities in relation to the questions that are raised. I think the Court has always made a distinction between an undertaking given by counsel under instructions from his client, and an undertaking given without such instructions, where, as in the present case, the undertaking was given by counsel without consulting his client, and by inadvertence. I know of no authority that prevents the Court from granting relief from the undertaking. The thing that is important in such a case, in my opinion, is to be satisfied that it was really through inadvertence that the undertaking was given without specific instructions. There would seem to be no doubt on that matter in this case, for the appellant's counsel not only was very prompt to ask opposing counsel to relieve him, but his explanation seems to have been fully accepted. In a letter from senior counsel for the respondent, written three days later, after telling of his communication with counsel who had been associated with him in the trial, he continued:—

"He felt as I did, that it was not necessary to make any change in the way in which the records had been endorsed, and if there is an appeal we shall then ask the Judge to vary his order."

Appellant's counsel has not sought to be relieved of the undertaking and, at the same time, to have the benefit of the terms for which the undertaking was the price. It seems to me that

the most convenient way of dealing with the matter is to require the appellant to consent to leave being given by the trial judge, to the respondent, to cross-appeal on the question of the costs of the former trials, so that the whole matter may be properly worked out when this Court comes to dispose of the appeal.

GILLANDERS J.A.:—The judgment from which the appellant Smith appeals was the result of the second trial of these two actions, which were brought following a motor accident. In one action the appellant claimed damages against Holmes and his driver Place for personal injuries, and in the other action Holmes claimed against Knight and the appellant for damages to his motor truck and Knight counterclaimed for damages to his motor car which the appellant had been driving at the time of the casualty. The verdict of the jury was adverse to the appellant and Knight.

The costs of the abortive trial fell to be disposed of by the trial judge. Before judgment was given on the jury's findings, counsel for Holmes stated in court that if the appellant and Knight would undertake not to appeal he would not ask the Court to award against them any costs other than those of that trial. Counsel representing the appellant and Knight at the trial asked permission to retire and consult his clients. On returning and after stating to the Court "upon our undertaking not to appeal you will award only costs of the present trial", he gave to the Court his undertaking not to appeal, whereupon the trial judge endorsed the record disposing of the costs in accordance with the arrangement. Later the same evening, as shown by the material now filed, in respect of which the facts are not in question, counsel realized that while he had intended getting the authority of both his clients before giving any undertaking, he had inadvertently and mistakenly acted on the instructions of Knight only. Early the next morning he spoke to counsel for the other side, seeking to be released from his undertaking. Counsel for the respondent wrote him a letter which, it is suggested, might be interpreted as a release of any undertaking in this respect. However, the correspondence which immediately followed not only disclaims any consent to withdraw the undertaking given, but takes the position that the undertaking must stand, and when the parties eventually went before the trial judge on the settlement of the judgment, counsel for the respond-

ents did not consent that the undertaking be withdrawn. One can understand the respondents not wishing to concede anything which might result in continuing the protracted litigation.

Prima facie, counsel at the trial was clothed with full and complete authority to compromise and bind his clients by such an undertaking. Even if the letter from the respondents' counsel the following morning is viewed as a consent to withdrawal that, in my view, is not sufficient. The undertaking here was given to the Court, and when the parties appeared before the trial judge no consent to withdraw was given. In this respect the case should be distinguished from *In re Hull and County Bank; Trotter's Claim* (1879), 13 Ch. D. 261, where the undertaking in question was given to counsel on the other side. Under the circumstances here, the undertaking having been given in terms to the Court, and the Court having acted thereon in disposing of the question of costs, it becomes a matter of some importance.

In Harvey v. Croydon Union Rural Sanitary Authority (1884), 26 Ch. D. 249, referred to in *Re Rose*, [1943] O.W.N. 457, [1943] 4 D.L.R. 122, Cotton L.J. said in part:

"Mr. Justice Pearson considered it to be settled that a consent could be withdrawn at any time before the order was drawn up, without regard to the question whether there was any mistake or error in giving the consent. If a consent is given through error or mistake, there can be no doubt that the Court will allow it to be withdrawn if the order has not been drawn up. But the question is very different whether when counsel, being duly authorized, have given a consent, there being no mistake or surprise in the case, the party can arbitrarily withdraw that consent."

And Lord Coleridge L.C.J. said as follows:

"In the Queen's Bench Division this case would not have been arguable, it being quite settled there that a consent given by counsel with authority and with full knowledge of the facts is binding and cannot be withdrawn. I agree with the Lord Justice Cotton that this is the right rule, both in the interest of counsel and of those who employ them."

In the case at bar, accepting the facts in the material filed, it is apparent that the appellant's counsel intended to get the authority of his clients before giving any undertaking. He was acting for two parties. Knight, from whom he had taken most

of his instructions, was present in court and was agreeable that the undertaking be given. In the light of the fact that it seems clear that counsel did not intend to act on his own authority without instructions from his client, and gave the undertaking forgetting that he had only the authority of one of his clients, I think, *qua* the appellant, it may under these very special circumstances be said to have been given through error or mistake, and, in so far as the appellant is concerned, might be withdrawn on terms. Murray's New English Dictionary includes, among the meanings of "error", "Something incorrectly done through ignorance or inadvertence; a mistake", and among the meanings of "inadvertence", "an oversight". It is apparent that if no such undertaking had been given all the costs that fell to be disposed of by the trial judge would have followed the event. The appellant cannot both escape being bound by the undertaking of counsel and also get the advantage obtained by its having been given. The undertaking may be withdrawn upon the terms indicated in my Lord's judgment.

LAIDLAW J.A.:—The question to be now determined by this Court is whether or not the appellant ought to be released from an undertaking given by counsel appearing on her behalf not to appeal from a judgment of Plaxton J. dated 19th November 1943, after trial with a jury.

It is well established as a rule of law "that the general authority to conduct a cause gives the attorney authority to compromise," per Erle C.J. in *Chown et al. v. Parrott et al.* (1863), 14 C.B.N.S. 74 at 83, 143 E.R. 372; *Prestwich et al. v. Poley* (1865), 18 C.B.N.S. 806, 144 E.R. 662. Authority to compromise includes authority to undertake not to appeal: *In re West Devon Great Consols Mine* (1888), 38 Ch. D. 51. A client is bound by an undertaking given by counsel on his behalf in good faith, and within the scope of his authority, although it may be entered into without consultation with, or instructions from, the client: *Bailey v. Bailey*, 2 Chy. Chrs. 57 at 58.

The undertaking in this case was given in open court by counsel appearing at the trial on behalf of the appellant (plaintiff in one action and one of the defendants in the other action, both actions being tried together). It was given after a verdict was found against her and before the learned trial judge delivered judgment. Under such circumstances it becomes more

than a promise by one party to another. It is at the same time an undertaking with the Court, which cannot properly be avoided or modified without approval of the Court. See *Hickman v. Berens*, [1895] 2 Ch. 638.

Counsel argues that the undertaking now in question is not binding on the appellant, and that the Court ought to allow this appeal to be taken because (1) the undertaking is not recited or contained in the formal judgment of the Court; (2) it was given under a mistake or misapprehension on the part of counsel; and (3) the appellant was released from the undertaking by counsel for the respondents.

The fact that an undertaking, entered into in open Court before judgment was given, and which is clearly set forth in the record of proceedings, does not form part of the formal judgment as issued and entered, is not in itself sufficient to avoid the consequences of it. It is desirable that such an undertaking be included in the endorsement on the record by the learned trial judge, and also in the formal judgment, but the omission so to do cannot deprive the party for whose benefit it was given of his right to enforce it. The case of *In re Hull and County Bank; Trotter's Claim* (1879), 13 Ch. D. 261, is distinguishable. There was no clearly expressed undertaking on the part of counsel, no note on counsel's brief, and the registrar of the Court refused, under the particular circumstances, to include an undertaking in the form of judgment as settled.

The facts of the present case do not disclose any mistake, error, misapprehension or surprise upon which the Court could properly say that the consenting party ought not to be bound. Counsel for all parties entered into the compromise in good faith for the mutual benefit of their clients. They were *ad idem*, and there is nothing to show any misunderstanding on the part of any one. Counsel who gave the undertaking simply says that he inadvertently omitted to consult with his client and obtain instructions from her before he promised not to appeal. But he did not require express authority or instructions, under the circumstances of this case, to make his act binding on the appellant, and his inadvertence does not entitle his client to a release from the obligation properly assumed on her behalf.

But the principle upon which the authority of counsel to give an undertaking of the kind in question depends likewise enables counsel to consent on behalf of his client to a release from an

undertaking given by an opposite party to the proceedings. It appears in this case that on the day following the trial counsel for the appellant communicated with senior counsel for the respondents and asked to be released from the undertaking in so far as it applied to the appellant. It is stated by counsel as a fact (and the word of counsel is accepted by the Court without proof of the facts stated) that the request was granted and the release from the undertaking was given. The consent of senior counsel for the respondents to release the appellant was sufficient, and the consent of other counsel appearing at the trial on behalf of the respondents was unnecessary. The appellant requires only the approval and consent of the Court to free her completely from the undertaking, and thus remove all hindrance to her appeal. The consent of the Court ought, in my opinion, to be given under the particular circumstances, and the appellant permitted to proceed with the appeal. But the consent of the Court ought to be on terms that the appellant consent to leave being given by the trial judge to the respondents to cross-appeal on the question of costs of the former trials.

Preliminary objection overruled on terms.

Solicitor for the appellant: J. M. Simpson, Napanee.

Solicitor for the respondents: R. E. Nourse, Picton.

[COURT OF APPEAL.]

Burns v. Burns and Fredericks.

Divorce and Matrimonial Causes—Cruelty—What Constitutes—Impairment of Health without Physical Violence or Threat thereof.

Legal cruelty, sufficient to justify a judgment for alimony, need not inevitably and in all cases consist in physical violence or the threat of such violence. There may be cases, possibly exceptional and few in number, where the husband's course of conduct, though free from personal violence or threats, is nevertheless such as to undermine the wife's health, and in such circumstances she will be entitled to relief on the ground of cruelty. *Lovell v. Lovell* (1906), 13 O.L.R. 569, considered. Each case must be considered according to its particular circumstances, great care being exercised to see that cases put forward on this basis are successful only when clearly and firmly established.

AN appeal by the plaintiff from the judgment of Roach J., [1944] O.W.N. 566, dismissing the action. The facts are fully stated in the reasons for judgment of GILLANDERS J.A.

18th October 1944. The appeal was heard by HENDERSON, GILLANDERS and LAIDLAW J.J.A.

H. L. Cartwright, for the plaintiff, appellant: Whether a divorce is granted or not, the appellant is entitled to alimony on the ground of cruelty. It has been found as a fact by the trial judge that her health has been affected. Cruelty may consist in a course of conduct short of physical violence, provided the appellant's health is affected or there is a reasonable possibility that it will be affected. The trial judge has confused physical violence with physical danger. There are many strong cases in support of our position in this matter: *Lovell v. Lovell* (1906), 13 O.L.R. 569; *McIlwain v. McIlwain* (1916), 35 O.L.R. 532, 28 D.L.R. 167; *Whimbey v. Whimbey* (1919), 45 O.L.R. 228, 48 D.L.R. 190; *Bagshaw v. Bagshaw* (1920), 48 O.L.R. 52, 54 D.L.R. 634; *Dowsett v. Dowsett*, [1942] O.W.N. 593; *Kelly v. Kelly* (1870), L.R. 2 P. & D. 59; *Russell v. Russell*, [1897] A.C. 395.

W. H. Herrington, K.C., for the respondent: The appellant had been quarrelling with her husband for months. She had no fear of him and often assumed the role of the aggressor. He remained impassive and refused to argue with his wife. [GILLANDERS J.A.: Do you say that the course of conduct, in order to constitute cruelty in law must be supported by physical violence or apprehension of physical violence?] Yes; the trial judge has found that there was nothing menacing or threatening

in the husband's conduct towards his wife, and nothing to cause her any apprehension of danger.

H. L. Cartwright, in reply.

Cur. adv. vult.

26th October 1944. HENDERSON J.A.:—I have had the privilege of reading the opinions of my brethren Gillanders and Laidlaw.

I incline to the view that the conduct of the defendant and the co-respondent is so inconsistent with any conclusion other than that alleged by the plaintiff that but for the opinion of my brethren I would be prepared to conclude that the plaintiff had established her case for divorce. Nevertheless I defer to the opinions of my brethren and do not dissent.

I am in complete accord with the findings of my brethren upon the question of alimony and concur therein.

GILLANDERS J.A.:—The appellant brought this action against her husband and his co-defendant for divorce and alimony, and in the alternative for alimony on the grounds of cruelty and desertion.

The respondents defended and were represented by counsel, but did not testify or call any witnesses.

The learned trial judge found the conduct of the husband "indecent and reprehensible", and again, "shabby, indecent and despicable." The reading of the evidence fully supports such a description, indeed it might be thought to be an under-statement of his shameful conduct and the brazen and obdurate determination with which he continued his association with his co-defendant against the pleading of the appellant, even at the trial of this action, where they appeared and defended by the same solicitor and counsel, sat together in court, but refrained from offering any testimony or putting on record any explanation or indication of discontinuing or moderating the indefensible course of conduct which led the appellant finally to seek a remedy in the courts.

I agree with the conclusion of the trial judge that the action for divorce must fail. The evidence, while it raises very strong suspicions, falls short of providing a basis for an inference on which a decree could be founded. Nor is there evidence of desertion which could support a judgment for alimony.

The question whether the uncontradicted evidence and the findings of fact of the trial judge are sufficient to support a judgment for alimony, based on grounds of cruelty, deserves careful consideration.

The appellant and her husband were married in 1930, and have two children, one nearly eleven years of age and the other nearly three years of age. Until the summer of 1943, the couple apparently lived happily. They purchased a modest home which stands in the names of both and of a former employer of the wife, to secure some advances he made.

In July 1943, the happy relations which had existed broke down, owing to the husband's conduct. He is employed as a mechanic at a battery company, where his co-defendant is also employed. He started going out at nights more often, claiming that he was returning to work, and although it had never been his practice when returning to work to change from his working clothes, he commenced to shave and change to better clothes before going out. On the wife learning that he was associating intimately with his co-defendant, he admitted it. Upon being asked to discontinue it, if not for her sake, for that of the children, he bluntly refused, and indicated that he intended to continue. On being asked to admit or deny improper relations with his co-defendant, he declined to do either. From articles which he was carrying in his clothing, and his course of conduct at home, and from what she knew of his association with Mrs. Fredericks, the appellant had every good reason to be highly suspicious that he was unfaithful to her. Occasionally he stayed out all night and he was occasionally absent for longer periods. On one occasion, when he was followed, he picked up his co-defendant and a case of beer with a taxi and went to a party. Later in the evening they were seen embracing and kissing outside the house where this party was said to be. He did not return until the next afternoon, and when he returned he was drunk. When the appellant complained and asked him to discontinue his course of conduct, he chided her that she "could not take" the fact that he was going out with Mrs. Fredericks. On one occasion during one of these repeated exchanges the appellant called Mrs. Fredericks "a name that is not very nice to hear", whereupon he slapped her face and twisted her wrist and she kicked him. Apart from that incident he did not

physically abuse his wife, and apparently he did not mistreat the children at any time.

Although they lived in the same house—but not occupying the same room—the evidence shows, as the trial judge says: "By and large, the husband adopted an attitude in which he ignored the plaintiff", but it is clear that he brazenly persisted in his determination to continue his associations with his co-defendant and repeatedly aggravated his wife by intimating that she "could not take it", even although he must have seen the evidence of the changing condition of his wife's health.

The trial judge finds:

"The plaintiff is suffering from some female trouble since the birth of her first child. During the past year this condition has become aggravated. In January 1943 she consulted her physician concerning this disability. She had been an abnormally stout woman, 5 feet 5 inches tall, and weighing 210 pounds. Since the summer of 1943 she has lost thirty pounds and has developed a condition of 'nerves'. She has consulted her physician with respect to this nervous condition and complains of inability to sleep and general nervous debility. Her physician gave evidence and stated that if the condition which caused this nervous debility continues she will likely suffer a complete nervous collapse. He did not attribute the plaintiff's condition of nervousness to her female trouble. He left the impression with me that in his opinion this nervous debility was due to some outside circumstances and agency operating on the mind of the plaintiff. In the opinion of her physician medicine will do her no good. My conclusion on the evidence is that the plaintiff's present condition of nervousness is due to the conduct of her husband and his attitude towards her. Her whole equilibrium has become upset. Her reaction to it has been a combination of anger, disappointment and fretfulness."

Various cases deal with the law applicable, but the authoritative statement contained in the case of *Lovell v. Lovell* (1906), 13 O.L.R. 569, has more than once been recognized as containing a clear and correct statement. In that case, although ill-treatment, threats and neglect causing the plaintiff to become so broken down in health that she was unable to live under the strain was alleged, no actual physical violence was alleged or shown. Moss C.J.O. stated the law applicable to be:

"Throughout the case it has been strenuously argued for the defendant that, according to the law of England, there can be no cruelty sufficient to entitle a wife to a divorce and alimony as incident thereto unless there is shewn, danger to life, limb or health, bodily or mentally, or a reasonable apprehension of it; and that the danger must be founded on some physical facts, such as actual violence or threats of violence, leading to an apprehension that, if continued, danger to life, limb or health will ensue, or to an apprehension that the fear of the continuance of such a course of conduct will affect the health and bring about serious bodily and mental suffering to such an extent as to incapacitate the spouse so affected for the performance of the duties of the marital state. But the decisions, many of which have been referred to and discussed in the judgments in the Courts below, do not so confine the definition of legal cruelty. And while it is recognized that violence and personal danger are far the most common ground, the cases do not rest there. They shew that in a proper case relief will be given where there is no personal violence and no threats of it, but where there is conduct of such a kind as to undermine health. No doubt such cases are comparatively rare and should be admitted with great caution. But that the law recognizes them, and is prepared to give relief where the facts justify it, is beyond question. It is said that by the decision arrived at in *Russell v. Russell*, [1895] P. 315, affirmed [1897] A.C. 395, the definition of legal cruelty has been limited to cases of violence, actual or threatened, and the mental effects thereby produced. The actual decision in that case was that Earl Russell's bodily or mental health had not in fact been affected by the charge against him made and persisted in by his wife, odious and abominable though it was; but even the absence of this element was not, in the opinion of Rigby, L.J., in the Court of Appeal, and Lord Halsbury, L.C., and Lords Hobhouse, Ashbourne and Morris, in the House of Lords, a sufficient reason for withholding relief. And the speeches of the majority of the Lords do not shew that they intended to affirm the proposition that the test of injury to health, or a reasonable apprehension thereof, is confined to fears occasioned by actual violence, bodily hurt or threats thereof. This is manifest from the observations of Lord Shand, at p. 463, and of Lord Davey, at p. 467. The case is not to be taken as overruling the numerous

cases preceding it which recognize the propriety of relief in cases of cruelty not dependent on violence, actual or threatened."

In the same case Garrow J.A. said in part:

"Much must depend upon the individuality of the parties. Conduct which would in one case be very palpable cruelty might as between other parties differently organized fall far short of the standard upon which the Court should act. . . .

"The result of the case in the House of Lords was to affirm the judgment of the Court of Appeal reported in [1895] P. 315. And the proposition so affirmed was simply this: 'We define it' (legal cruelty) 'thus: There must be danger to life, limb, or health, *bodily or mental*, or a reasonable apprehension of it, to constitute legal cruelty;' *per Lopes, L.J.*, at p. 322. In the House of Lords, Lord Shand, concurring with the judgment of Lord Herschell, says: 'Where however the criterion came to be stated in the determination of the merits of the cases, having regard to the facts in evidence, that criterion was danger or apprehension of danger to life or health,—which it must be observed, with reference to much of the argument for the appellant is a much more comprehensive term than *physical violence*, and a term which has, I think, been found sufficient to cover all the cases in which hitherto relief has been granted': p. 463.

... "From these authorities it may, I think, be safely asserted that legal cruelty does not necessarily depend upon physical violence or threat of violence, but may arise from acts or conduct operating entirely upon the mental system of the spouse complaining."

In the case at bar, while there have been no sufficient acts of physical violence, the trial judge has found, as indicated above, that the appellant's present condition of nervousness is due to the conduct and attitude of her husband.

There is no suggestion that the husband has any intention of moderating or changing the course that he has followed in the past. The appellant's physician having expressed the opinion, which is not questioned, that if the condition which caused this nervous debility continues she will likely suffer a complete nervous collapse, I incline to the view, with respect, that the circumstances present here bring the case within the class of cases envisaged in the judgment quoted—possibly exceptional and few in number—where the husband's course of conduct, free

from personal violence or threats of it though it be, has nevertheless been such as to undermine the wife's health, and she is entitled to relief on the ground of legal cruelty.

The appellant should have custody of the two infant children.

I would allow the appeal with costs here and below and direct a reference to ascertain the amount of the alimony to which the appellant is entitled.

LAIDLAW J.A.:—I agree with the opinion and reasons of my brother Gillanders. I emphasize my view on one point. It must surely be beyond all doubt and controversy that danger to a person's health may be caused by a course of conduct of another person without any physical act or threat of bodily harm. A persistent malevolence and viciousness may be exercised and exhibited with such inhumanity and brutality as to be a torture far beyond that occasioned by physical violence.

It would be entirely wrong to permit such an evil-doer to escape the consequences of his wrong merely because he refrained from doing a physical act of harm. It is not required in law that the element of danger to a spouse be founded on physical facts. Each case must be considered according to the particular circumstances, great care being exercised to see that cases put forward on the basis discussed are admitted only when clearly and firmly established.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Cartwright & Cartwright, Kingston.

Solicitors for the defendants, respondents: Herrington & Slater, Kingston.

[COURT OF APPEAL.]

Cohen v. S. McCord & Co. Limited.

Negligence—Contribution between Joint Tortfeasors—How Contribution Obtained—The Negligence Act, R.S.O. 1937, c. 115, ss. 2(1), 5.

There was at common law no right of contribution or indemnity between joint tortfeasors, and The Negligence Act, now R.S.O. 1937, c. 115, permitting such contribution and indemnity as between two persons each of whom has been guilty of negligence causing or contributing to injury to a third person, is the sole source of such a right. That statute, in addition to creating the right, provides a method for its enforcement, by bringing in other persons who are or may be wholly or partly responsible, either as party defendants or as third parties, in an action brought by the injured person. It is clearly the intention of the legislation that all issues between such persons shall be litigated in one action, and it follows that this means of enforcing the right to contribution and indemnity is exclusive. Where, therefore, judgment has been given against a defendant in an action based upon negligence, he cannot afterwards sue a third person, claiming that the latter is wholly or partly responsible for the damages. *Pasmore et al. v. The Oswaldtwistle Urban District Council*, [1898] A.C. 387; *Doe d. The Bishop of Rochester v. Bridges* (1831), 1 B. & Ad. 847; *The Wolverhampton New Waterworks Company v. Hawkesford* (1859), 6 C.B.N.S. 336; *Wake v. Mayor, etc. of Sheffield* (1883), 12 Q.B.D. 142; *Lamplugh v. Norton et al.* (1889), 22 Q.B.D. 452, applied.

Estoppel—Res Judicata—Extent of Rule—Matters which might have been, but were not, Litigated in Previous Action.

The principle of *res judicata* applies only where the issues before the Court have been distinctly put in issue and directly determined by a court of competent jurisdiction in a previous action. *Rex v. Manchuk or Munchuk*, [1938] O.R. 385 at 424; *Southern Pacific Railroad Company v. United States* (1897), 168 U.S. 1 at 48, applied. The mere fact that a plaintiff might, in an earlier action to which he was a party, have asserted the right which he now seeks to enforce is not sufficient, if in fact that right was not before the court in that action.

AN appeal by the plaintiff from the judgment of Hogg J., *ante*, p. 363, [1944] 3 D.L.R. 207, dismissing the action.

18th October 1944. The appeal was heard by HENDERSON, GILLANDERS and LAIDLAW J.J.A.

R. F. Wilson, for the plaintiff, appellant: The question at issue is the interpretation of s. 2(1) of The Negligence Act, R.S.O. 1937, c. 115, originally enacted as s. 3 of 1930, c. 27. [HENDERSON J.A.: The plaintiff had a perfect right to sue both tortfeasors, or to discontinue his action against either one. It was still open to you in that action to assert your rights against the McCord company.] [LAIDLAW J.A.: Under the 1930 Act, your client would have had a statutory right to contribution from the joint tortfeasor. Subsequently, procedure was provided whereby this right could be enforced by adding a party defendant or third party. If the statute creates a right and sets out a procedure, is not that what should be done, and does

it not preclude you from taking any other means?] Section 5 of the Act is permissive. The only way that the Court can say we have lost our rights is by saying that the section is obligatory. We are not put to our election. To extinguish a right there must be clear and unequivocal language: *Craies on Statute Law*, 4th ed., p. 68.

The principle of *res judicata* does not apply, because this is a cause of action separate and distinct from that determined in the previous action. If the very issue has not been before the Court, it remains open: *Carroll and Carroll v. The Erie County Natural Gas and Fuel Company et al.* (1899), 29 S.C.R. 591 at 593, 594.

E. L. Haines, for the defendant, respondent: Because of the appellant's decision not to claim contribution or indemnity in the previous action, the respondent retired from the case, and he consequently suffered certain disabilities. For this reason, the appellant is estopped from bringing his present action. The statute contemplates that where a defendant proposes to claim contribution from a person not a party to the action, he must bring that person before the Court in the action in which he is being sued; otherwise the provisions of s. 5 would be of no value. Where the statute provides a remedy, it alone must be used: *The Wolverhampton New Waterworks Company v. Hawkesford* (1859), 6 C.B.N.S. 336, 141 E.R. 486; *Pasmore et al. v. The Oswaldtwistle Urban District Council*, [1898] A.C. 387 at 394.

R. F. Wilson, in reply.

At the conclusion of the argument THE COURT delivered judgment orally, dismissing the appeal with costs. Written reasons were later delivered as follows:

7th November 1944. HENDERSON J.A.:—I agree with the conclusions reached by my brethren Gillanders and Laidlaw, and in the reasons therefor, and have nothing to add.

GILLANDERS J.A.:—The parties to this action were both defendants in a prior action brought by one Krawchuk claiming against both defendants for damages arising out of a motor accident.

During the course of the trial of that action, counsel for the plaintiff Krawchuk advised the Court that he had agreed with counsel for the defendant McCord company that the plaintiff's action against that defendant should be dismissed without

costs. Upon being asked if there was any reason why this should not be done, counsel for the present appellant, after consideration, stated: "so far as this action is concerned I am not making any claim over against the co-defendant McCord." The Krawchuk action was thereupon, on consent, dismissed as against the McCord company without costs.

Judgment having eventually gone against the defendant Cohen, the present appellant, and having been sustained with a variation on appeal, and, it is alleged, paid by the present appellant, he brought this action seeking contribution or indemnity. When the pleadings were delivered the parties concurred in stating a question of law for the opinion of the Court under Rule 126. The question stated is:

"(1) Is the Plaintiff now entitled to bring this action for contribution or indemnity having failed to make a claim for contribution or indemnity against S. McCord & Company Limited in the original action of Krawchuk v. Cohen and McCord?"

If the answer to this question was "no", the parties agreed that this application was to be turned into a motion for judgment and this action dismissed with costs. But if the answer was "yes", the application was to be dismissed with costs.

Mr. Justice Hogg, before whom the application came, dismissed the appellant's action with costs, and an appeal is now taken to this Court.

If a remedy were otherwise open to the appellant in this action it would not, I think, be barred on the ground of *res judicata*. The issue between the parties to this action has never been adjudicated upon. The appellant here could, I think, have pressed his claim against the respondent in the original action, but this was not done and the issues now raised were not there the subject of adjudication. There is no judgment disposing of the issues between the present parties.

In *Rex v. Manchuk or Munchuk*, [1938] O.R. 385 at 424, referring to the principle of *res judicata*, Middleton J.A. said in part:

"I have more than once referred to the well considered statement of the meaning and effect of the modern rule in the judgment of the Supreme Court of the United States in *Southern Pacific Railroad Company v. United States* (1897), 168 U.S. 1, at p. 48:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

Applying that here, it is apparent that the issue now raised was never previously "directly determined by a court of competent jurisdiction."

Any right which the appellant had, or has, to claim contribution or indemnity in tort does not find its origin in the common law. It is conceded that it must rest wholly on the provisions of The Negligence Act, now R.S.O. 1937, c. 115, and amendments thereto. Admittedly, a plaintiff cannot be forced to make any claim he does not wish to assert, nor can a defendant be forced to make a claim over against a co-defendant, or bring in a third party where he does not wish to proceed. However, the provisions of the Act seem wide enough to afford every opportunity to a defendant, by adding other parties (either as defendants or as third parties), to obtain in the one action whatever contribution or indemnity he merits and chooses to claim. It appears obvious, for various reasons, that it would be very desirable, and much more convenient, that such claims should be determined in one action. Apart from the multiplicity of proceedings, one can think of situations arising in subsequent actions for contribution or indemnity which would raise matters of difficulty. No doubt, if an obligation is imposed or a right is created, and no limitation is imposed or procedure indicated for enforcing the obligation or right, the person wishing to do so might not be bound by consideration of convenience alone. In *Pasmore et al. v. The Oswaldtwistle Urban District Council*, [1898] A.C. 387 at 395, the Lord Chancellor indicates that the convenience of the procedure there in question did not pass unnoticed. In *Rex v. Poplar Borough Council*, [1922] 1 K.B. 72, Bankes L.J. says, at p. 88:

"In the first place, as pointed out by Lord Macnaghten in *Pasmore's Case*, the general rule to which I have already referred admits of exceptions, which must depend on the scope and

language of the Act which creates the obligation, and on considerations of policy and convenience."

In the same case Scrutton L.J. says, at p. 94: "As pointed out by Lord Macnaghten in the *Oswaldtwistle Case* the enforcement of the rule of limitation of enforcement of a statutory right to the statutory remedy must depend on the scope of the Act, and on considerations of policy and convenience, by which I understand to be meant that, where the performance of the statutory obligation will not be ensured by the statutory remedy, the importance from a view of policy of securing the performance of the statutory obligation may lead the Court to grant other remedies than the statutory one."

In that case it was thought that the respondents were not limited to the statutory remedy, and the course taken was thought to be "the only suitable and convenient course."

In my view, a reading of the whole statute here shows that not only is provision made for contribution and indemnity between persons who by their fault or neglect have caused or contributed to damage, but it also provides the procedure whereby this may be done in the action in which the damage claim is made. The right given must be viewed, not as a right at large, but as a right of which the exercise is given only in the action brought for the loss or damage in question.

It is true that s. 2(1) of the Act, on which the appellant must found his right for contribution and indemnity, while obviously readily applicable to work out the remedy provided in the original action, does not itself exclude other means of doing so. When, however, one reads this subsection with the provisions of subss. 2 and 3, and ss. 3 and 4, and particularly s. 5, as amended to date, which makes provision for adding as a party defendant or as a third party to the action (in pursuance of the amendment by 1939, c. 47, s. 23) "any person not already a party to the action [who] is or may be wholly or partly responsible", it is, I think, sufficiently clear that the right given is one to be worked out in the action by the means therein provided.

In *Pasmore et al. v. The Oswaldtwistle Urban District Council, supra*, the Earl of Halsbury L.C., says:

"The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is

one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe d. The Bishop of Rochester v. Bridges* (1831), 1 B. & Ad. 847 at 859, 109 E.R. 1001. He says: 'where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner'." See also *In re Iverson and Greater Winnipeg Water District*, 31 Man. R. 98, [1921] 1 W.W.R. 621, 57 D.L.R. 184 at 196, and cases there cited.

In *Fort Frances Pulp & Paper Co. v. Spanish River Pulp & Paper Mills Ltd.*, [1931] 2 D.L.R. 97 at 112, Lord Blanesburgh referred to and approved the principle stated in the cases which he there cited, but concluded that, on a fair reading of the provisions there in question, the course pursued was open.

I appreciate that in most of the cases referring to the application of the principle referred to in *Pasmore's Case*, the statute had set up some separate forum and procedure where the relief might be obtained, as distinct from indicating any particular proceeding in the courts in which the remedy might be worked out. I think, however, that the principle stated is still applicable here, and that the persons from whom contribution or indemnity is sought, in pursuance of the obligation imposed by the statute, must, as indicated in and contemplated by the statute, be brought into the one action as party defendants or third parties.

This appeal and the action should both be dismissed with costs.

LAIDLAW J.A.:—This is an appeal by the plaintiff from a judgment of Hogg J., dated the 12th day of May 1944, whereby the plaintiff's action was dismissed with costs after an answer was given by the Court in the negative to the following question submitted by the parties, under Rule 126 of the Rules of Practice: • "Is the Plaintiff now entitled to bring this action for contribution or indemnity having failed to make a claim for contribution or indemnity against S. McCord & Company Limited in the original action of *Krawchuk v. Cohen and McCord*?"

It is desirable to state the facts and show the course of proceedings giving rise to the question to be determined.

An infant, Krawchuk, suffered personal injuries as a result of an accident on a highway in the city of Toronto. In an action commenced by his father, as next friend and on his own behalf,

it was alleged that "the Plaintiffs sustained loss and damage by reason of the Motor Truck owned by the Defendant, S. McCord & Co. Limited, and the Motor Vehicle of the Defendant Alfred Cohen on the said highway and the negligence of the drivers thereof." As appears, S. McCord & Co. Limited and Alfred Cohen were co-defendants. Each of them pleaded the provisions of The Negligence Act, R.S.O. 1937, c. 115, and amendments thereto, but neither one made an allegation of negligence or a claim against the other. When the case came on for trial the plaintiffs abandoned their claim as against the defendant McCord company. Counsel for the co-defendant Cohen made it plain that no claim over against the defendant McCord company was being made "so far as this action is concerned". The record was thereupon endorsed, "Counsel for the plaintiff and defendant S. McCord & Co. Limited consenting, action by the plaintiff against latter dismissed without costs." The trial of the action proceeded against the defendant Cohen only. In answer to questions submitted by the learned trial judge, the jury found that the defendant Cohen had not satisfied them that he was not guilty of negligence or improper conduct which caused or contributed to the injuries of the plaintiff child; that the injuries were not caused or contributed to by the negligence of the plaintiff child; and they assessed the amount of damages suffered by each of the plaintiffs. Judgment, dated 22nd April 1943, was issued and entered in favour of the plaintiffs against the defendant Cohen for \$2,300, the amount of damages found by the jury (subsequently reduced, after appeal to the Court of Appeal, but not affecting the question now before the Court); the judgment also provided that the action as against the defendant S. McCord & Co. Limited be dismissed.

Thereafter, on 28th June 1943, Cohen commenced an action against S. McCord & Co. Limited in a County Court, the proceedings being subsequently transferred to the Supreme Court. The statement of claim sets forth the course of proceedings in the former action, the amount of the judgment and costs, together with additional solicitor and client costs, and that payment thereof was made by the plaintiff Cohen. It is alleged "that the injuries suffered by the infant John Krawchuk were the result of the negligence of the driver of the Defendant S. McCord & Co. Limited's truck", and the particular acts and omissions alleged to constitute such negligence are set forth. By

para. 15, "The Plaintiff pleads and relies upon the Negligence Act, being 1937 R.S.O. Chapter 115 and the amendments thereto, as a basis for his claim for indemnity or contribution as against the Defendant in respect to the damages suffered by the Plaintiff by reason of the negligence of the Defendant." In para. 16, "The Plaintiff therefore claims (a) The sum of \$4,173.40. (b) Such other and further order as to this Court may seem meet. (c) The costs of this action."

The defendant, by its statement of defence, pleads, *inter alia*, "that the plaintiff has waived his rights to contribution or indemnity against the defendant and is estopped from making such claims in this action", and "that the said Alfred Cohen can not obtain contribution or indemnity for his own negligence."

The parties agreed to state the question of law quoted above for adjudication by the Court as provided by Rule 126 of the Rules of Practice. After argument before Hogg J., judgment was reserved, and was subsequently delivered on 12th May 1944. The learned trial judge held that it was not the intention of the Legislature "where the fault or negligence of two or more defendants in an action in tort is before the Court, and the question of such negligence and the right to contribution and indemnity between such defendants can be decided in the action brought by an injured person for damages, [that] the issue of the degree of fault of one of the defendants, and the right to contribution, should be made the subject of another action between defendants to the original action." He also concluded that "the principle of *res judicata* applies, and [that] Cohen cannot, because of the estoppel set up by this doctrine, now seek to have the question of negligence against, and of contribution from, the McCord Company decided in the action which he has now brought." It is of much importance first to examine the class of cases to which The Negligence Act applies and the remedies intended to be provided therein, having particular regard to the obligations of persons liable thereunder to make contribution and indemnity.

The doctrine of contributory negligence was not finally settled at common law until after a long period of litigation. It became established as a rule of English jurisprudence in the case of *Butterfield v. Forrester* (1809), 11 East 60, 103 E.R. 926. Many cases show the rigour with which the rule was enforced, e.g., in *Pluckwell v. Wilson* (1832), 5 C. & P. 375, 172 E.R. 1016,

Mr. Justice Alderson left it to the jury to say whether the injury complained of was occasioned by negligence on the part of the defendant's servant, without *any* negligence on the part of the plaintiff himself, "for that, if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict." The element of proximate cause was disregarded, and the plaintiff was held responsible for negligence in any degree, without considering the connection of such negligence to the cause of the injury. The law of proximate cause relative to contributory negligence at common law was defined and settled in *Radley et al. v. The London and North Western Railway Company* (1876), 1 App. Cas. 754. It was thereafter clear that in a case where the negligence of each party was a proximate cause of the injury, neither one of them could recover against the other. There was no common law liability upon either party. The Contributory Negligence Act, 1924, (14 Geo. V, c. 32) altered the rights of the parties in such cases. It enabled the plaintiff to recover judgment against a defendant whose negligence was a proximate cause of the loss or injury, notwithstanding some degree of negligence on his own part as an immediate and proximate cause thereof. The statute at the same time took away the defence, in such a case, that the plaintiff's negligence was a proximate cause of the loss or damage. Lamont J., in *Littley et al. v. Brooks and Canadian National Railway Company*, [1932] S.C.R. 462 at 487, [1932] 2 D.L.R. 386, 39 C.R.C. 306, says: "In enacting the Contributory Negligence Act the Legislature gave a right of action to a plaintiff guilty of contributory negligence." The statute has no application unless the faults of both parties to an action are proximate causes of the loss: *McLaughlin et al. v. Long et al.*, [1927] S.C.R. 303, [1927] 2 D.L.R. 186, per Anglin C.J.C. at p. 311. See also *Farber v. Toronto Transportation Commission*, 56 O.L.R. 537 at 540, [1925] 2 D.L.R. 729. Thus there can be no apportionment of damages as provided by the Act, unless the negligence of each party to an action was a *causa efficiens* of the loss. A determination that negligence of the defendant and of the plaintiff was each a proximate cause of the loss or injury is a condition precedent to the apportionment of liability and damages. No provision was made in the statute for joinder, as parties to the action, of persons who might be wholly or partly responsible for the damages claimed. There was no right or

obligation as between two or more persons found to be at fault or negligent. This condition of the law was changed in 1930. The Contributory Negligence Act, *supra*, was repealed and replaced by The Negligence Act, 1930 (20 Geo. V., c. 27). By s. 3 of that statute, "where two or more persons are found liable they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, . . . each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent." It was also provided, by s. 6: "Whenever it appears that any person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant upon such terms as may be deemed just."

The liability imposed by this statute on two or more persons found liable in an action founded upon their fault or negligence is new. It did not exist at common law. It is declared that such persons shall be "jointly and severally" liable. Likewise the obligation as between themselves, that "each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent", is created by the Act and did not exist at common law. See *Esten v. Rosen*, 63 O.L.R. 210, [1929] 1 D.L.R. 275. This consideration becomes of paramount importance. It is of equal importance to observe that the liability and remedy over thus created by statute is limited in application to the event "where two or more persons are found liable . . . in any action founded upon the fault or negligence of two or more persons." A finding of liability, in an action as specified, is a requisite and a condition precedent to the statutory rights and obligations.

The same statute that creates the liability provides means by which the Court may add, as a party defendant to the action, any person who "is or may be" wholly or partly responsible for the damages claimed. I think it is made clear that the statute was intended to provide the machinery to enable the Court in one action to determine the liability of all persons whose negligence might be a proximate cause of the loss or injury sustained, and to give in that action the remedy of contribution and indemnity as between two or more persons found liable. The

Negligence Act, 1930, does not alter the principles properly applicable to the law of contributory negligence. It is still an essential that "the fault or negligence" of each person found liable in an action to which the Act applies shall be a *causa proxima*. It is almost impossible to conceive of a determination in one action of the proximate and decisive causes of an injury done, and a subsequent enquiry, in another action, as to other proximate causes. Such a course would, I think, result in confusion, contradiction and complexities far beyond imagination and defeat the purpose of the legislation. In the present instance a jury has found that the statutory onus imposed on Cohen, the defendant in the first action, has not been satisfied, and in consequence of that finding it must be concluded that negligence on his part was a proximate cause of the damages resulting from the accident in question. He now seeks a finding that negligence of the defendant McCord company was the sole and decisive cause of the loss, and asks full indemnity. The oppugnancy made possible by such procedure is apparent. Again, suppose a jury apportioned the negligence causing or contributing to an injury as between a plaintiff and a defendant, to the full extent of 100 per cent. Could a court subsequently determine that another person or persons, not charged in that action by either party with negligence, ought to be found guilty of some additional degree of fault or negligence contributing to the mischief? How could that be done without disregarding the findings already made? And how could such a determination be made in the absence of one of the participants in the occurrence from which the injury results? My view is that it was intended by the legislation that all issues between all persons who may be wholly or partly responsible for the damages claimed ought to be the subject of one action only. No other remedy or procedure was available at common law to enforce the obligation to make contribution and indemnity as provided by the statute, and no procedure is provided therein apart from the action in which two or more persons are found liable.

The negligence Act 1930 was amended in 1931 (by 21 Geo. V., c. 26), also in 1935 (by 25 Geo. V., c. 46), and as contained in the Revised Statutes 1937, c. 115, s. 2 reads, in part, as follows:

"2.—(1) Where damages have been caused or contributed to by the fault or neglect of two or more persons the court shall

determine the degree in which each of such persons is at fault or negligent, and, . . . where two or more persons are found at fault or negligent, they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent."

In 1939 (3 Geo. VI, c. 47, s. 23) an amendment was made to s. 5, and the section now reads as follows:

"Whenever it appears that any person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant or may be made a third party to the action upon such terms as may be deemed just."

It is argued that the provision of the Act for the addition of any person as a party defendant or third party to an action is permissive; that there is no obligation to follow that course; and that upon a proper construction of the Act as it now reads a person may maintain an action to enforce the obligation of contribution and indemnity, apart from the procedure made available by the statute. I do not agree. I think the amendments made since to The Negligence Act, 1930, do not in any way change the construction I have placed upon it. It is true that the word "may" must be construed as permissive (R.S.O. 1937, c. 1, s. 32(r)), and that consequently the Court is not bound to make an order to join a person as a party to an action. But if a party to an action intends to seek contribution or indemnity from any person, he need only make it appear to the Court that such person "may be" responsible "wholly or partly" for the damages claimed, and adequate machinery for the determination of his rights is contained in the Act.

The substitution of the words "Where damages have been caused or contributed to by the fault or neglect of two or more persons", for the words "In any action founded upon the fault or negligence of two or more persons" (The Negligence Act, 1931, *supra*) does not enlarge the code of procedure existing before the amendment, or enable a person to enforce the rights created by the legislation in a different manner than therein

provided. Likewise, the amendment to s. 3 of the Act made in 1935 (25 Geo. V, c. 46, *supra*) by substituting the words "where two or more persons are found at fault or negligent", in lieu of the words "where two or more persons are found liable" does not change the construction which ought to be put on the enactment. Liability of two or more persons continues to be a condition precedent to the right to contribution and indemnity created by the statute.

My opinion is given in the light of the language used in The Negligence Act, and the purpose which I think was intended to be accomplished by the legislation. But it is helpful also to approach the question with the guidance of certain general rules of construction. In *Doe d. The Bishop of Rochester v. Bridges* (1831), 1 B. & Ad. 847, 109 E.R. 1001, Lord Tenterden C.J., at p. 859, states the rule applicable to the circumstances in that case, as follows:

" . . . where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case."

In *The Wolverhampton New Waterworks Company v. Hawkesford* (1859), 6 C.B.N.S. 336, 141 E.R. 486, Willes J., at 356, says: "There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common-law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The present case falls within this latter class, if any

liability at all exists. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

Brett M.R. in *Wake v. Mayor, etc. of Sheffield* (1883), 12 Q.B.D. 142 at 145, says: "The statute has imposed on certain persons a liability not known to the common law, and has given to other persons powers and duties also not known to the common law: and it seems to me to follow that where that is the case, and where, as here, there is an Act of Parliament which has imposed a new liability, and given particular means of enforcing such new liability such mode of procedure is the only one to be followed and used for that purpose."

Reference may be had also to *Lamplugh v. Norton et al.* (1889), 22 Q.B.D. 452. I quote Lord Esher M.R. at p. 457, as follows: "A new obligation is created, and a remedy is given in the same section. It seems to me that under these circumstances the same rule of construction applies, and the section must be treated as a code containing all the law with regard to the recovery in respect of the new obligation, and that there can be no other mode of recovery than that specified."

See also *Pasmore et al. v. The Oswaldtwistle Urban District Council*, [1898] A.C. 387.

I do not pause to discuss the special circumstances giving rise to the decision in each of the cases referred to, but take from them the rules which seem to me to be properly applicable to the question before the Court. Nor do I permit the application of such rules to dictate my opinion. I have treated the rules as a guide to point the way I ought to go, and to assist me to find the intention of the legislation.

I do not discuss the principle of *res judicata*, except to say that, in my view, it is not applicable to the circumstances under consideration. My opinion, for the reasons I have given, is that the appeal ought to be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Day, Ferguson, Wilson & Kelly, Toronto.

Solicitors for the defendant, respondent: Haines & Haines, Toronto.

[HOPE J.]

Saari v. Nykanen.

Divorce and Matrimonial Causes—Nullity of Marriage on Ground of Subsisting Marriage of One Party—Absence of Discretion in Court.

Where it is proved that one of the parties to a ceremony of marriage was already married, the other party is entitled *ex debito justitiae* to a decree of nullity, and the Court has no discretion to refuse such a decree. *Bateman v. Bateman* (otherwise *Harrison*), 78 L.T. 472, followed. In such circumstances, neither delay nor insincerity on the part of the plaintiff will constitute a bar to the relief claimed. The Supreme Court of Ontario has jurisdiction, under The Divorce Act (Ontario), 1930 (Dom.), c. 14, to grant such a decree. *Grassick v. Grassick*, [1935] O.R. 50; *Welsh v. Bagnall*, [1944] O.R. 526, applied.

Evidence—Proof of Foreign Marriage—Extracts from Foreign Registers—“Genealogy”.

To prove a marriage performed in Finland, the plaintiff produced a certificate or “genealogy”, signed by the rector of a parish in Finland, and bearing the seal of the parish. A Finnish Lutheran clergyman, called as a witness, swore that the Lutheran church in Finland had the status of a state church, that the clergy thereof were charged with the recording of vital statistics, and that certificates of rectors or pastors of the church were accepted as evidence in the courts in Finland. He also verified the signature of the clergyman who had signed the “genealogy”.

Held, the certificate was admissible, and sufficiently proved the foreign marriage. *Lyell v. Kennedy* (1889), 14 App. Cas. 437; *Alsop v. Bow-trell* (1620), Cro. Jac. 541; *Omichund v. Barker* (1728), Willes 538; *Piers et al. v. Piers* (1849), 2 H.L. Cas. 331, applied.

AN action for a declaration of nullity of marriage. The facts are fully stated in the reasons for judgment.

3rd November 1944. The action was tried by HOPE J. without a jury at Toronto.

H. A. Coon, for the plaintiff.

No one for the defendant.

14th November 1944. HOPE J.:—In this action the plaintiff seeks a declaration of the Court that a marriage celebrated between herself and the defendant on 15th August 1925 was void on the ground that at the time of such marriage there was a valid and subsisting marriage of the defendant with another woman, which latter marriage had been contracted in Finland.

At the time of the marriage ceremony in August 1925, the defendant represented himself as a bachelor. It was only after two years or more that the plaintiff learned from a friend of the defendant, who was visiting them, that the defendant had a wife and children in Finland. When confronted with this information the defendant admitted the same. The parties hereto then separated in the year 1928, at which time the plaintiff consulted a solicitor.

In 1935, being desirous of marrying her present husband Saari, the plaintiff again consulted a solicitor and was advised that she was not legally married to the defendant because of his prior subsisting marriage. At that time the plaintiff secured from Finland a church record issued by the Tampere Bishopric and the Kuusankoski Congregation, a genealogy which is in the form of a certificate certifying that the defendant had been wed in Christian matrimony on the 31st day of July 1909, to another woman in Finland and that two children had been born of the marriage. This certificate was issued and signed by the rector of the Kuusankoski Parish and the seal of the parish was attached to the certificate. At the same time the said rector wrote to the plaintiff advising her that the defendant had not taken a lawful divorce from his wife in Finland and stating that if a lawful divorce had been obtained the same would have been noted in the genealogy. A cablegram from the rector was also filed, addressed to the plaintiff in the name of Mrs. H. Nykanen, confirming the information contained in the genealogy.

On the strength of this information as to the prior subsisting marriage of the defendant, and on the advice of a solicitor, the plaintiff, on 13th June 1935, was married at Sudbury to one Saari.

If the evidence of the prior subsisting marriage be accepted, then the plaintiff is entitled *ex debito justitiae* to a decree of nullity.

In *Bateman v. Bateman (otherwise Harrison)* (1898), 78 L.T. 472, Barnes J. referred to the earlier cases of *Miles v. Chilton (falsely calling herself Miles)* (1849), 1 Rob. Eccl. 684, 163 E.R. 1178, and *Andrews (falsely called Ross) v. Ross* (1889), 59 L.T. 900, in support of his conclusion that a petitioner is entitled *ex debito justitiae* to a declaration of nullity when the respondent's spouse was alive at the time of the second marriage. He also held that the Court had no discretion as to withholding this relief.

Prior to The Divorce Act (Ontario), 1930 (Dom.), c. 14, it was repeatedly held that there was no jurisdiction in this Court to declare a marriage void *ab initio*, but this last named statute introduced into Ontario the law of England not only as to the dissolution of marriage but as to the annulment of marriage as that law existed on 15th July 1870. This jurisdiction of the Court was accepted by Kerwin J. in *Grassick v.*

Grassick, [1935] O.R. 50, [1935] 1 D.L.R. 351, and more recently by Hogg J. in *Welsh v. Bagnall*, *ante*, p. 526.

It is quite clear that the law of England so introduced provided that one of the requisites to a valid marriage was that there should not be a valid subsisting marriage of either of the parties with any other person.

In order to ascertain whether a marriage is void *ab initio*, the circumstances which constitute a valid marriage must be investigated. It is also clear that in cases of void marriages neither delay nor insincerity constitutes a bar to the relief claimed.

The prior marriage of the defendant was admitted to the plaintiff at the time when she first learned of it, and was further admitted by the defendant to the process-server herein, at which time the defendant stated that his wife in Finland had died approximately ten years ago.

The letter and cablegram before referred to are not evidence of the prior subsisting marriage. The "genealogy", however, may be accepted in proof of the marriage upon certain conditions.

In *Lyell v. Kennedy; Kennedy v. Lyell* (1889), 14 App. Cas. 437 at 448-9 Lord Selborne stated that "Foreign registers of baptisms and marriages, or certified extracts from them, are receivable in evidence in the Courts of this country, as to those matters which are properly and regularly recorded in them, when it sufficiently appears . . . that they 'have been kept under the sanction of public authority, and are recognised by the tribunals of the country (. . . where they are kept) as authentic records'."

A Finnish Lutheran clergyman now resident in Ontario was called as a witness. This gentleman swore that he had been educated and ordained as a clergyman in Finland and had functioned there as such, prior to his departure for England and subsequently Canada; that by the law of Finland, with which he was familiar, the Lutheran Finnish Church enjoys the status of a state church, and that the clergy thereof are charged with the recording of vital statistics, and that the certificates of the rector or pastor of such church are received in the courts of Finland as evidence. This witness could verify from personal knowledge the signature of the clergyman issuing the "genealogy" filed herein.

In the very early case of *Alsop v. Bowtrell* (1619), Cro. Jac. 541, 79 E.R. 464, the Court held that the certificate of a minister of a church in Utrecht, Germany, was sufficient, when coupled with evidence of cohabitation, to prove the marriage and the cohabitation.

In *Omichund v. Barker* (1728), Willes 548 at 549, 125 E.R. 1310, Willes J. held that such a certificate was satisfactory and admissible evidence of the fact that such a marriage as described in it was performed, though it would not go to prove the subsequent cohabitation.

In *Piers et al. v. Piers* (1849), 2 H.L. Cas. 331, the certificate of a clergyman of the established church of the country concerned was admitted as evidence. See also *The Perth Earldom Case* (1848), 2 H.L. Cas. 865; also *Brice v. Brice* (1919), 35 T.L.R. 486.

On these authorities I feel that I am justified in accepting the evidence of the prior marriage, and on the evidence I can find that such marriage was subsisting at the time of the ceremony of marriage between the plaintiff and the defendant in 1925. Therefore there shall be a declaration of this Court that the marriage of the plaintiff with the defendant celebrated on the 15th day of August 1925, is void *ab initio*. Costs to the plaintiff.

Judgment for plaintiff with costs.

Solicitor for the plaintiff: H. A. Coon, Toronto.

[COURT OF APPEAL.]

Re Hatch and Fanny Farmer Candy Shops, Inc.

Companies—Shares—Transfer—New York Corporation—Ineffectiveness of Transfer Made and Registered only in Ontario.

H., a resident of Ontario, and domiciled there, was the registered owner of shares in a company incorporated under the laws of the State of New York. H. died in Ontario, and the certificate for the shares was found in that Province. This certificate bore upon its face the statement that it was "transferable in the City of New York or in Toronto, Canada", and both a transfer agent and a registrar had been appointed in Toronto. H.'s executor, who was also the sole beneficiary under his will, completed the form of endorsement on the certificate and presented it, with consents from the Ontario and Dominion succession duty departments, to the Toronto transfer agent, but the latter refused to transfer the shares until a waiver of United States tax had been obtained. The executor then applied for, and obtained, an order in the nature of *mandamus*, directing the Toronto transfer agent to transfer the shares, and the Toronto registrar to register them. The New York corporation and the Toronto transfer agent appealed.

Held, the order must be set aside. Section 10 of the Stock Corporation Law of the State of New York, which governed the company in question, provided that every company should keep a "stock book" at an office in the State of New York, and that, with an exception not here relevant, "No transfer of stock shall be valid as against the corporation, its stockholders and creditors for any purpose . . . until it shall have been entered in such book as required by this section". In these circumstances, the Toronto transfer agent could not validly transfer the shares, since an act must be done in New York before the transfer could become effective, and the registrar could not register such a transfer, and the order made would be ineffective. In view, however, of all the circumstances, and particularly of the misleading statement on the certificate, the appellants should not have any costs of the proceedings.

AN appeal by Fanny Farmer Candy Shops, Inc. and National Trust Company Limited, its transfer agent at Toronto, from the order of Hogg J., [1944] O.W.N. 445, [1944] 3 D.L.R. 477, directing the transfer and registration of certain shares. The facts are fully stated in the reasons for judgment.

11th October 1944. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW J.J.A.

C. F. H. Carson, K.C., for the appellant: Section 10 of the Stock Corporation Law of New York State requires a company to keep in that State a stock book, in which transfers of stock must be entered in order to be valid. Even though the company has a transfer agency in Toronto, it is necessary in order to effect the transfer that such transfer be made upon the books of the company in New York. This company should not be ordered by *mandamus* to do something in violation of New York law. National Trust Company cannot issue a new certificate without the consent of the Rochester transfer agency. Under

United States law, the Hatch estate is subject to federal estate tax upon the shares in question because the Fanny Farmer company is a domestic corporation within the meaning of s. 862(2) of the Internal Revenue Code of the United States, and its shares are deemed to be property within the United States. By virtue of the fact that the Hatch certificates must come into the possession of the company by delivery to it or one of its agents, the company would come within the definition of "executor" in s. 930(a) of the Internal Revenue Code. It would follow that any transfer made by it without compliance with the legislation and regulations concerning the conduct of executors would subject it to liability for the tax and the penalties incurred by infractions of the regulations.

Re Russell, [1942] O.R. 466, [1942] 3 D.L.R. 668, is distinguishable from the present case, because there the Court assumed that there was no liability for succession duties in Quebec, whereas in the case at bar there is liability for duties in the United States. Further, in the *Russell* case, there was no suggestion that the shares could not be effectively transferred in Ontario. [ROBERTSON C.J.O.: The question here and the succession duty questions in *The King v. Williams et al.*, [1942] A.C. 541, [1942] 2 All E.R. 95, [1942] 3 D.L.R. 1, [1942] 2 W.W.R. 321, are not necessarily the same thing. The problem in the case at bar continually returns to s. 10 of the Stock Corporation Law of New York. Are these shares property within the United States for the purpose of their taxing Act?] The trial judge should have reached a conclusion as to whether the granting of a mandatory order would expose the Fanny Farmer company to liability in the United States, and in any event, whether an effective transfer could be made by National Trust Company Limited in Toronto.

A mandatory order should not have been granted on originating motion under Rule 622. The proper procedure was an action: Holmested & Langton, Ontario Judicature Act, 4th ed., at pp. 83 and 1474.

J. W. Pickup, K.C., for the respondent: The question in issue is whether or not these shares are transferable in Ontario. The corporation says on its certificate that the shares are transferable in Toronto; consequently, it is estopped from denying this fact. [GILLANDERS J.A.: The shares are not transferable here without the consent of the Rochester transfer agency.] We are

simply asking the company to do what it would have done if the statement on the share certificate had been true. These shares were stated to be transferable in Toronto. [ROBERTSON C.J.O.: A share vested in a shareholder occupies no place. It cannot be seen or felt; a share has no physical existence.] This matter will resolve itself into the problem of which of us should go and find out whether duty is payable in the United States. There is no reason why the remedy of *mandamus* should not be applied. It is the action of the company that has brought about this situation. This Court should deal with the case on the basis of the order made by Hogg J. The shares are property situate in Ontario, and are not situate in the United States of America. The property being in Ontario, there can be no tax levied upon such property by any taxing authority in the United States of America. We rely upon the reasons for judgment of Hogg J. and the cases cited therein, *viz.*, *Re Russell*, [1942] O.R. 466, [1942] 3 D.L.R. 668; *The King v. Williams et al.*, [1942] A.C. 541, [1942] 2 All E.R. 95, [1942] 3 D.L.R. 1, [1942] 2 W.W.R. 321; *Re Thoburn; Ivey et al. v. The King*, 66 Que. K.B. 37, [1939] 1 D.L.R. 631.

C. F. H. Carson, K.C., in reply.

Cur. adv. vult.

22nd November 1944. ROBERTSON C.J.O.:—If I had had to deal with the problems presented to Hogg J. in this matter, upon the material before him, I should probably have come to the conclusions that he has stated in his reasons for judgment. As presented on argument of the appeal, a significance was attached to s. 10 of the New York Stock Corporation Law that is hardly indicated in the material before the Court below. It is true that s. 10 is referred to in the fourth paragraph of the affidavit of Mr. Seligman, but in terms that I think come far short of giving the full purport of the section, in its relation to the transfer of the shares here in question. Mr. Seligman's lengthy affidavit is principally in regard to provisions of federal revenue laws and regulations, which, in my opinion, do not constitute the primary difficulty in granting the *mandamus* that is sought.

On the argument in this court the full text of s. 10 of the New York Stock Corporation Law was before us. It is not disputed that this statute governs the Fanny Farmer Candy Shops, Inc. Mr. Justice Gillanders, whose judgment I have had the

privilege of reading, has set forth that part of s. 10 that is of direct application here. The requirements of the section are such that while it makes no restriction upon the making of a transfer of shares in any part of the world, a transfer, wherever made, is not valid as against the corporation, its stockholders and creditors, for any purpose, except to render the transferee liable for the debts of the corporation to the extent provided for, until it shall have been entered in a book that the corporation must keep at its office, or if it has, in the State of New York, a transfer agent, such stock book may be deposited in the office of such agent, or may be kept in the office of the corporation.

The result of this statute governing the company is that, without entry in the company's book, kept in the State of New York, of the transfer of the shares into the name of the applicant, the applicant is not entitled, as against the company or its stockholders and creditors, to the status of holder of these shares. The applicant would not be entitled to vote on the shares in person or by proxy. He would not be entitled to be paid dividends declared on the shares, nor to rank in respect of them on any liquidation or distribution of the assets of the company. Nor would he be entitled to have that which no doubt it is his immediate desire to have, a certificate of the company certifying that he is the holder of the shares, and bearing the signature of the National Trust Company Limited as transfer agent.

It is regrettable, if s. 10 of the Stock Corporation Law of New York was in force at the time, that a certificate was issued to Lawrence B. Hatch, now deceased (whose executor and beneficiary the appellant is), containing the statement that the certificate is transferable in the city of New York or in Toronto. That statement, in view of s. 10, is not now true, in the sense that commonly it would be understood. No doubt, a transfer, good as between the shareholder and his transferee, could be made in Toronto or elsewhere, as well as in New York, but, as I have already stated, a transfer made in Toronto or in New York or anywhere, is ineffective for most vital purposes, without entry in the book that must be kept in the State of New York, and unless and until so entered would not entitle the transferee to a certificate from the company that he is a shareholder. The remedies, if any, that the applicant may have for that misstatement in the certificate are not for our consideration on this

appeal. It may be that in reliance upon the statement in the certificate, the applicant paid succession duties in Ontario in respect of the shares, and it may be that he will contend that, in truth, the shares were not dutiable in Ontario. These are questions that it is not necessary that we should even consider on this appeal. It may be a reasonable assumption that the requirements of s. 10 of the New York statute did not assume any great practical importance in the case of this company, most of whose shares were held in Canada, until the imposition of estate taxes under the laws of the United States, and regulations to assure their payment, made strict observance of the State law governing the company a necessity. That this is probably the case would seem to be indicated by the terms of the refusal to transfer, made by the transfer agent at Toronto when the applicant presented the share certificate for transfer. He was told that the shares could not be transferred until he supplied a United States federal waiver, to evidence that no federal tax was payable in respect to the transmission of the shares. Nothing was said about the requirements of s. 10 of the New York State law.

The sole question before us, however, is with regard to the order in the nature of a *mandamus* made by Mr. Justice Hogg, directing that the National Trust Company Limited, as transfer agent for Fanny Farmer Candy Shops, Inc., do forthwith transfer to the applicant the shares in question, and that the Chartered Trust & Executor Company do forthwith register such transfer. Neither of these Toronto companies can do what it is ordered to do. The transfer agent in Toronto cannot transfer the shares in question, in the sense of doing what is necessary to make fully effective the transfer that the applicant has endorsed on the share certificate. Neither can the registrar at Toronto properly register the transfer. Something must first be done in the State of New York that this Court has not been asked to order to be done, and that I think this Court plainly has no jurisdiction to order to be done.

Upon this one ground I think the appeal must be allowed. In view, however, of the statement in the share certificate as to the shares being transferable in Toronto, and the absence of any explanation in regard to it, and the fact that the Toronto transfer agent made no reference, in refusing the transfer, to the ground now taken, and the further fact that even before

Hogg J. other grounds were mainly, if not wholly, relied upon by the present appellants, and that it was only upon the argument of this appeal that the provisions of s. 10 of the Stock Corporation Law of New York State have been fully presented to the Court, I would not award costs, either of the motion before Hogg J. or of the appeal, to the appellants. The appeal should be allowed without costs, and the order of Hogg J. should be set aside, and the motion for a mandatory order should be dismissed, all without costs to either party.

GILLANDERS J.A.:—The respondent is the executor and sole beneficiary under the will of L. B. Hatch, deceased, who at the time of his death was domiciled and resided in the Province of Ontario.

Among the assets of the deceased at the time of his death was a certificate for twenty shares of the common stock of Fanny Farmer Candy Shops, Inc., which certificate was in his safety deposit box in a bank where he resided, in the Province of Ontario. The stock certificate in question shows on its face that Fanny Farmer Candy Shops, Inc. was incorporated under the laws of the State of New York, and also states: "This Certificate is transferable in the City of New York or in Toronto, Canada." Further endorsements on the certificate show that the shares were registered by the Capital Trust Corporation Limited, Toronto, as registrar (the Chartered Trust & Executor Company having since succeeded the Capital Trust in that capacity), and countersigned on behalf of the National Trust Company Limited, Toronto, as transfer agent, and states that the certificate is not valid until countersigned by the transfer agent and registered by the registrar.

The respondent executor endorsed the said stock certificate as executor, for transfer to him personally, and forwarded it, with the letters probate and consents to the transfer in so far as succession duties leviable by the Province of Ontario and the Dominion of Canada were concerned, to the appellant National Trust Company Limited, requesting that the transfer be made. The appellant trust company declined to make the transfer until a United States waiver of federal tax had been furnished.

The respondent thereafter launched this application, seeking an order in lieu of a *mandamus*, directing the National Trust Company as transfer agent of Fanny Farmer Candy Shops, Inc.

to transfer the stock certificate in question, and directing the Chartered Trust & Executor Company as registrar of the candy company to register the transfer in the name of the respondent. The application came on before Hogg J. and that learned judge was of opinion that the decision in *Re Russell*, [1942] O.R. 466, [1942] 3 D.L.R. 668, was applicable and made the order asked. It is from this order that an appeal now comes to this Court.

It seems important at the outset to keep in mind several points in which the situation in the *Russell* case is to be distinguished from the situation here. In that case the shares were in a mining company incorporated under the laws of the Province of Quebec, which maintained a transfer office in Ontario, but there is no suggestion that the company there concerned lacked power or capacity validly to establish a transfer office in Ontario, where transfer of its stock could be completed without anything being done in the Province of Quebec.

In *The King v. Williams*, [1940] O.R. 403, [1941] 1 D.L.R. 22, affirmed [1942] A.C. 541, [1942] 2 All E.R. 95, [1942] 3 D.L.R. 1, [1942] 2 W.W.R. 321, the point was argued in the Court of Appeal that the company there in question, an Ontario company, lacked the power to authorize the transfer of its shares at any place other than the head office of the company within the Province. This submission was rejected by the Court. See the judgment of Robertson C.J.O., [1940] O.R. at 405, and of Masten J.A. at pp. 406 *et seq.*

In the case at bar the material before the Court shows that the company, Fanny Farmer Candy Shops, Inc., was incorporated under the laws of the State of New York, and that s. 10 of the New York Stock Corporation Law applies to this company. That section is rather lengthy. It provides for stock corporations keeping books of account at its office, containing certain particulars, and that if the corporation has a transfer agent in the State the book may be deposited in the office of such agent; it makes provision for keeping the stock book open for inspection by certain persons, and contains, *inter alia*, the following relevant provision:

"No transfer of stock shall be valid as against the corporation, its stockholders and creditors for any purpose except to render the transferee liable for the debts of the corporation to the extent provided for in this chapter until it shall have been entered in such book as required by this section, by an entry

showing from and to whom transferred; nor, in the case of a domestic stock life insurance corporation until ten days after written notice of such transfer shall have been filed in the office of the superintendent of insurance."

The section further provides for penalties for neglect or refusal to keep the books mentioned, and makes other provisions. In short it is provided that every New York corporation is required to keep stock books in New York State in which transfers of stock must be entered in order to be valid. The company having been incorporated under the laws of the State of New York, this provision of the corporation law of the State is a limitation on the powers of the company.

I think it is not important here whether or not there is liability for death taxes or succession duties in respect of the shares in question under the revenue laws of the State of New York or of the United States of America. It may be, as indicated in the material filed, that by the law of some other jurisdiction they are subject to a federal estate tax.

In the *Russell* case, *supra*, the learned trial judge was able to assume that there was no liability to succession duties in the Province of Quebec. It is not necessary or material here to consider what *situs* the shares in question have for the purpose of taxation. No question of taxes or duties imposed in this jurisdiction arises, and there seems little doubt, not only that no action would lie in our courts to enforce the revenue laws of another country: *Municipal Council of Sydney v. Bull*, [1909] 1 K.B. 7, but also as stated by Duff J. in *Smith v. The Rural Municipality of Vermilion Hills* (1914), 49 S.C.R. 563 at 568, 20 D.L.R. 114, 6 W.W.R. 841, affirmed [1916] 2 A.C. 569, 30 D.L.R. 83, [1917] 1 W.W.R. 108, "that the revenue laws of one country are not taken notice of in another country."

The provision here in question, while it may indirectly assist or aid in the collection of taxes which may be leviable in another country, is in essence and in fact a part of the corporation law of the jurisdiction in which the company was incorporated, and must be viewed as a limitation on the corporate powers of the company. The company is without power to do that which is prohibited by statute: *Re Mutual Investments Ltd.*, 56 O.L.R. 29, [1924] 4 D.L.R. 1070. That being so, there can be no valid or effective transfer of its stock until the transfer is entered in the book kept in the State of New York, and the company is without

power to authorize any agent on its behalf to complete any valid transfer of its stock until this has been done. It seems immaterial to inquire what the general or incidental powers of the company may be, in view of the express statutory limitation.

It is suggested that s. 10 of the New York Stock Corporation Law does not restrict the making of transfers, but merely provides that no transfer shall be valid until entered in the book kept within the State. A shareholder might, without reference to the company, transfer his shares to another so that he retained no title or rights therein as against his transferee. In this case the issue is not between the transferor and the transferee, but is between a shareholder and the company, and the right to compel transfer must be subject to any valid limitations of the company's powers.

It is urged that in view of the endorsements on the share certificate stating that the certificate is transferable in Toronto, combined with the fact that the certificate in question was issued and registered in Toronto, the appellants are estopped from saying that the transfer asked cannot now be made by the appellant, National Trust Company Limited. The statement on the share certificate that it is transferable in Toronto is incorrect and at variance with the statutory limitation of the company's powers. This fact, however, cannot give the respondent any right to compel the company to do that which it is prohibited from doing.

The order from which this appeal is taken is directed to the National Trust Company as transfer agent for the company, and the Chartered Trust & Executor Company as registrar, but not against the company itself. Both the transfer agent and the registrar are agents only. Their authority to act must be given by their principal. The resolution of the company under which the National Trust Company now acts provides that it shall not deliver new certificates until authorized so to do by the company's transfer agents in New York State. It is not necessary to decide whether, under these circumstances, it would be proper to direct an order to the transfer agent to do something beyond the authority from its principal.

For the reasons indicated the appeal should be allowed and the application should be dismissed. In view of the erroneous representation on the share certificate, and under all the circumstances, it is not a case for costs, here or below.

LAIDLAW J.A.:—This is an appeal from an order of Hogg J., dated the 13th June 1944, "that National Trust Company Limited, as transfer agent for Fanny Farmer Candy Shops, Inc., do forthwith transfer to Gerald Claire Hatch 20 shares of the common stock of Fanny Farmer Candy Shops, Inc. . . . now standing on the books of the company in the name of Lawrence B. Hatch . . . and registered in the books of the said company in his name"; and "that the Chartered Trust & Executor Company do forthwith register the said transfer."

Fanny Farmer Candy Shops, Inc., is a corporation created and existing under the Stock Corporation Law of the State of New York. The late Lawrence B. Hatch was a registered stockholder of the corporation, and at the time of his death was resident and domiciled in the Province of Ontario. Under the provisions of his will the shares of stock owned by him were bequeathed to his executor and sole beneficiary, Gerald Claire Hatch. A stock certificate covering the shares was in a safety deposit box at the Bank of Montreal in the city of Welland, Ontario. It contained on the face of it a statement as follows: "This certificate is transferable in the City of New York or in Toronto, Canada." The National Trust Company Limited (Toronto, Canada) is transfer agent in Ontario for the corporation and the Chartered Trust & Executor Company is registrar. The executor executed the form of transfer on the stock certificate in favour of himself personally. It was then presented to National Trust Company Limited at Toronto, together with letters probate and the necessary consents required in respect of Ontario and Dominion succession duties. The National Trust Company refused to transfer the shares without first receiving a United States of America federal waiver to evidence that no federal tax was payable in respect of the transmission of the shares. Gerald Claire Hatch thereupon made summary application by originating notice under Rule 622 of the Rules of Practice, and asked for an order in lieu of *mandamus* directed against National Trust Company Limited, transfer agent, and Chartered Trust & Executor Company, registrar, of Fanny Farmer Candy Shops, Inc.

It is of paramount importance to examine at once the law affecting the transferability of the shares of stock in question. It appears from evidence before the Court that the law applicable in the State of New York is found in:

- (1) the enactment cited as "Stock Corporation Law";
- (2) the Internal Revenue Code;
- (3) rules and regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

The Stock Corporation Law provides by art. 3, s. 10, in part as follows: "Every stock corporation shall keep at its office . . . a book to be known as the stock book, containing the names . . . of all persons who are stockholders of the corporation . . . If any such corporation has in this state a transfer agent, such stock book may be deposited in the office of such agent. . . . No transfer of stock shall be valid as against the corporation, its stockholders and creditors for any purpose except to render the transferee liable for the debts of the corporation to the extent provided for in this chapter until it shall have been entered in such book as required by this section by an entry showing from and to whom transferred".

The evidence before the Court does not disclose any way by which a valid transfer of stock can be made as against the corporation except as stipulated in art. 3, s. 10, of the Stock Corporation Law as quoted. In particular it does not appear that the corporation possesses any power whatsoever to extend or modify the way prescribed by the enactment. Indeed, it may be properly concluded from the language used in s. 10, *supra*, that no other means to make a valid transfer as against the corporation was contemplated. The act of entry in the stock book of the corporation, as prescribed, is a condition precedent which must be satisfied before a transfer becomes effective and valid as against the corporation. A clear distinction must be kept in mind between the relationship of a transferor to a transferee and the position in law of those persons as against the corporation. A transferor, by delivery to a transferee of a properly executed certificate, thereby vests in the transferee a legal and equitable title to the stock represented by the certificate as between themselves, and puts the transferee in a position to perfect his title as against the corporation. But the delivery of such a certificate does not (except in certain cases which need not be particularized) *ipso facto* vest the interest and legal title of a registered stockholder in the person to whom the certificate is delivered. If any further act be prescribed by law as a requisite to the perfection of title to the stock as against the

corporation, that act must be done, and if it be not done the title remains incomplete.

The cases of *Re Thoburn; Ivey et al. v. The King*, 66 Que. K.B. 37, [1939] 1 D.L.R. 631; *The King v. Williams, supra*, and *Re Russell, supra*, are clearly distinguishable from the case in appeal. In all of them a valid transfer as against the corporation could be made at the place where the certificates representing the shares of stock were located. The shares could be effectively dealt with at that place as against the corporation, but no such dealing is possible in the city of Toronto or the Province of Ontario with the shares of Fanny Farmer Candy Shops, Inc.

It must be kept in mind too that the cases referred to relate to the situs of shares of stock for the purpose of determining whether they are subject to succession duty. I note and quote the observation of Duff J. in *The Secretary of State of Canada v. The Alien Property Custodian for the United States of America et al.*, [1931] S.C.R. 169 at 195, [1931] 1 D.L.R. 890 at 900: ". . . the considerations determining the situs of an intangible item of property, for one purpose, may not be conclusive where it may be necessary to ascribe to it a constructive situs in some other connection, or for some other purpose."

Attention is directed by counsel to the statement on the stock certificate (quoted *supra*) that it is transferable in Toronto. This statement cannot constitute in law a contractual obligation on the part of the corporation or its transfer agent to either a stockholder or a transferee from him. So far as appears, and following from what I have said, it would not be within the corporate powers of the corporation to enter into such a contract. But the statement is a false representation to all whom it may concern. It must be read to mean that a valid transfer, as against the corporation, of the shares of stock covered by the certificate can be made at Toronto. Consequently it is untrue, deceiving and wrongful. I do not suggest what remedy might be available to a person acting thereon to his detriment or loss, nor what consequences might follow to the persons responsible for such wrongdoing. I do, however, condemn the practice. It should not have been adopted and should not be continued by any corporation or its agents acting under similar circumstances. The public is entitled to notice, expressed in the stock certificate in the clearest possible language, of the restrictions affecting the rights, as against the corporation, of persons who deal with its shares, and scrupulous care should be exercised

to ensure that no misunderstanding is possible by reason of any omission or misleading statement therein.

It is not necessary to discuss in detail the provisions of the Internal Revenue Code affecting the transfer of stock of the corporation with which we are concerned in this case. It is sufficient to say that by virtue thereof certain rules and regulations prescribed by the Commissioner of Internal Revenue are applicable and relevant to the question under consideration. I quote in part from such rules and regulations as follows:

"Reg. 105, s. 81.62. Transfer Certificates . . . Certificates permitting the transfer of property of nonresident decedents (regardless of citizenship) without liability will be issued by the Commissioner when he is satisfied that the tax imposed upon the estate, if any, has been fully discharged or provided for . . . Except as hereinafter stated, no domestic corporation or its transfer agent should transfer stock registered in the name of a nonresident decedent without first requiring a transfer certificate covering all the decedent's stock of the corporation and showing that such transfer may be made without liability . . . The requirements of this . . . section do not apply if there is an executor or administrator appointed, qualified, and acting within the United States."

No executor of the deceased stockholder has been appointed or qualified or is acting within the United States. It is proved that s. 81.62 of reg. 105, *supra*, is legally binding under the circumstances and Fanny Farmer Candy Shops, Inc. is required under the law of the United States to decline to transfer shares of its stock belonging to the estate of the deceased stockholder unless a transfer certificate issued by the United States Treasury Department has been presented.

In *Crawford v. The Provincial Insurance Company* (1859), 8 U.C.C.P. 263, Draper C.J., delivering the judgment of the Court, says, at p. 267: "Before we grant a *mandamus*, however, we have to be satisfied that the Company are legally bound to do that which the applicant desires to compel them to do, that is, to enter or register in the register or transfer books of the Company, the assignment from Hammett Hill to the applicant."

The matter thus rests as follows: If the applicant sought to compel the corporation, by *mandamus*, to transfer shares of its stock without first presenting a transfer certificate, such a proceeding must fail on the ground that no duty on the part of the corporation exists in law under such circumstances. The

applicant, however, asked for an order against National Trust Company Limited as transfer agent, and Chartered Trust & Executor Company as registrar. He did not ask that an order be made against the corporation. The fact that the corporation was named in the notice of appeal as an appellant does not alter the nature of the application. It is settled that under proper circumstances a *mandamus* will lie at the instance of a transferee of shares to compel the company to make the transfer on its books: see *Goodwin v. The Ottawa and Prescott Railway Company* (1862), 22 U.C.Q.B. 186; *Re Guillot and The Sandwich and Windsor Gravel Road Company* (1867), 26 U.C.Q.B. 246; *Re Macdonald and The Mail Printing and Publishing Company* (1876), 6 P.R. 309, and other cases referred to in Masten and Fraser, *Company Law of Canada*, 3rd ed. by W. Kaspar Fraser, K.C., at p. 388.

But a writ of *mandamus* should be addressed to the person whose duty it is to perform the act in question. Blackburn J., in *Reg. v. The Lords Commissioners of The Treasury* (1872), L.R. 7 Q.B. 387 at 398, says: "The general principle, not merely applicable to *mandamus* but running through all the law, is, that where an obligation is cast upon the principal and not upon the servant, we cannot enforce it against the servant as long as he is merely acting as servant." Again, at p. 399, he makes it plain that in such a case as this where the obligation, "such as it is", is upon the corporation, to be discharged through its servants, one cannot proceed against the servants. Likewise Lush J., at p. 402, shows the ground on which the present proceeding for an order in lieu of *mandamus* must fail, *viz.*, ". . . that the applicants have failed to make out that which is essential to entitle them to a writ of *mandamus*, namely, that there is a legal duty imposed" upon National Trust Company Limited or Chartered Trust & Executor Company "a duty as between them and the applicants" to make a valid transfer and registration of the shares of stock of the corporation. See also *Upton v. Hutchison et al.* (1899), 2 Que. P.R. 300 at 307.

For the reasons given I am of the opinion that the appeal ought to be allowed, the order of Hogg J. set aside without costs, and the application for a mandatory order dismissed without costs.

Appeal allowed without costs.

Solicitors for the appellants: *Lash & Lash, Toronto.*

Solicitors for the respondent: *Pettit & Darby, Toronto.*

[COURT OF APPEAL.]

Genereux et al. v. The City of Windsor.

Taxation—Tax Enforcement Proceedings—Registration of Tax Arrears Certificate—Redemption—Amount to be Paid—Whether Interest Chargeable on Arrears or on Current Year's Taxes—The City of Windsor Act, 1932 (Ont.), c. 95, s. 4(1)—The Assessment Act, R.S.O. 1937, c. 272, s. 147.

S. 3 of The City of Windsor Act, 1932 provides that the City may become owner of lands with respect to which taxes are in arrear by filing a tax arrears certificate. By s. 4(1) the former owner is given a right to redeem within one year after the filing of the certificate, by paying the amount set forth in the certificate, together with certain costs and expenses, and "all taxes including the local improvement rates and interest thereon which would have accrued against the land if it had remained the property of the former owner and had been liable for ordinary taxation".

Held, this provision did not entitle the City to demand additional interest or percentages (as provided for in s. 147 of The Assessment Act) on the amount of arrears as shown in the certificate. The City was, however, entitled to claim interest on the taxes for the current year, which would have accrued between their falling due and the date of redemption, where the by-law levying the taxes for that year provided for payment in instalments, and for interest on any instalment not paid on the due date.

AN appeal by the plaintiffs from the judgment of Gordon Co. Ct. J. upon a case stated by the parties. The facts are fully stated in the reasons for judgment.

9th and 10th November 1944. The appeal was heard by ROBERTSON C.J.O. and ROACH and MCRUER JJ.A.

R. G. Ferguson, for the plaintiffs, appellants: The City, having assumed sole and absolute ownership of the property, has no right to charge interest on the arrears after the date of registration of the certificate, or interest on the taxes for the year following the registration. The City has received, by way of rent, more than the current year's taxes.

This is special legislation and has nothing to do with The Assessment Act, R.S.O. 1937, c. 272, or any other general Act. The city treasurer cannot rely upon s. 147 of The Assessment Act as authorizing the charging of interest on the arrears.

Lorne R. Cumming, for the defendant, respondent: The whole dispute is upon the construction of the words "all taxes including the local improvement rates and interest thereon", etc., in s. 4(1) of The City of Windsor Act, 1932 (Ont.), c. 95. What taxes would have accrued must be determined by reference to The Assessment Act, R.S.O. 1937, c. 272. [ROBERTSON C.J.O.: The words "interest thereon" can surely apply only to taxes accruing after the registration of the certificate.] In-

terest on the previous arrears is included in the word "taxes". This word must include all taxes included in the general municipal scheme. S. 147 of The Assessment Act clearly provides that interest shall become part of the taxes. Interest is added to the collector's roll under s. 136 of that Act. The interest is not a penalty, but is itself taxes, validly and legally imposed: *Lynch v. The Canada North-West Land Company* (1891), 19 S.C.R. 204 at 211, 5 Cart. 427. I also refer to s. 99 of The Assessment Act.

R. G. Ferguson, in reply.

Cur. adv. vult.

24th November 1944. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the decision of Judge Gordon of the County Court of the County of Essex, upon a case stated by the parties. The dispute arises over the proper interpretation of certain provisions of The City of Windsor Act, 1932 (Ont.), c. 95, and the appellants' claim is to recover certain money which they allege they were improperly required to pay on the redemption by them of lands which the municipal corporation had taken over, pursuant to the above-mentioned statute, for arrears of taxes.

The Act in question provides, by subs. 2 of s. 3, that where any part of the taxes on improved land within the municipality remains unpaid on the 1st day of January in the third year following that in which the taxes were levied, such improved land shall be vested in and become the property of the corporation, upon registration by the treasurer of a tax arrears certificate, subject to the right of redemption thereafter provided, and to the provisions of subs. 5. Subs. 5 relates to lands in which the Crown has an interest, and does not apply here. Subs. 3 of s. 3 provides that the treasurer may register in the registry office a tax arrears certificate in a form prescribed, setting forth a description of the land upon which any part of the taxes remains unpaid after the time mentioned in the preceding subsection, and the amount of such unpaid taxes, with the amount of all penalties, interest and costs added thereto, and that, thereupon, the land described in the certificate shall be vested in and become the property of the corporation, its successors and assigns, in fee simple or otherwise, according to the nature of the estate,

right, title and interest of the owners at the time of such vesting, and clear of and free from all such estate, right, title and interest, and all charges and encumbrances thereon and dower therein, subject only to the right of redemption thereafter provided, and to the provisions of subs. 5.

These provisions have the effect of enabling the municipality to acquire title to land upon which taxes remain unpaid for the term prescribed, without having first to advertise the land for sale and offer it for sale at public auction, and the municipality is relieved from observance of the numerous provisions of The Assessment Act, R.S.O. 1937, c. 272, in relation to the sale of land for taxes as well as of much expense. At the same time this special Act provides, in s. 13, that the powers contained in the Act shall be deemed to be in addition to and not in derogation of any power of the corporation under any other Act, but when the provisions of any general or special Act conflict with the provisions of this Act, the latter shall prevail. It is, therefore, optional with the municipality whether it shall, in any case, have recourse to the provisions of this Act, or shall make use of the provisions of The Assessment Act, where taxes upon land are unpaid.

It is not necessary for the purposes of this appeal, to make anything more than this general examination of the provisions of s. 3 of the Act, as the matter in dispute does not relate to the title acquired by the corporation, or to the steps necessary to acquire it, but solely to the matter of redemption, which is provided for by s. 4. That is the provision of the Act, the interpretation of which is in dispute. Subs. 1 of s. 4 is as follows:

"The owner of or any person appearing by the records of the registry office to have an interest in any vacant land or improved land in respect of which a tax arrears certificate has been registered may redeem the same at any time within one year after the date of registration of the certificate by paying to the corporation the amount set forth in such certificate in respect of the land to be redeemed, together with the amount of all expenses incurred by the corporation and the treasurer in registering the certificates and for searches and postage and \$1 for each certificate and for each notice sent under subsection 4 of section 3, and also by paying to the corporation all taxes including the local improvement rates and interest thereon which would have accrued against the land if it had remained the prop-

erty of the former owner and had been liable for ordinary taxation and if the value thereof is not shown upon the assessment roll, such taxes shall be computed at the rate fixed by by-law for each year for which such taxes are payable upon the value placed thereon upon the assessment roll for the last preceding year in which it was assessed and the local improvement rates shall be computed at the rate fixed in the by-law by which the same were rated or imposed and upon the frontage as shown upon the list of properties and the frontages thereof as settled by the court of revision for such local improvement, and a certificate of the treasurer as to the total amount payable in order to redeem the land shall be final and conclusive."

It is agreed that there were taxes in arrear in respect of the lands of the appellants now in question, and that on the 24th November 1942 the treasurer registered a certificate under the provisions of s. 3 of the Act, and that the amount set forth in that certificate was \$3,441.51. The appellants redeemed the lands on the 20th November 1943, paying, by way of redemption money, \$4,207.01, under an arrangement that the amount so paid was paid under protest and without prejudice to the right of the appellants to claim a refund of a sum claimed by them to be in excess of the proper amount to which the municipality was entitled. It may conveniently be stated here also that the respondent does not rely upon the provision at the end of subs. 1 of s. 4, that a certificate of the treasurer as to the total amount payable in order to redeem shall be final and conclusive.

It would be cumbersome, and is unnecessary, to go in detail into all the figures set forth in the stated case, and the methods of computation. It is sufficient to say that it is admitted for the municipality that there was an overpayment of the sum of \$253.15, while the appellants claim that the overpayment was \$455.72. Two items, of \$195.67 and \$6.90, make up the difference between these sums. The first of these two items is an amount that the municipality claims it was entitled to as a percentage on the amount of taxes due and unpaid, as stated in the certificate registered, to be added pursuant to s. 147 of The Assessment Act, for the period between the registration of the certificate and the date of redemption. The second item of \$6.90 is claimed for interest on the taxes for the year 1943, pursuant to the by-law levying the taxes for that year, which contains a provision for payment of taxes by instalments, and for interest

upon any instalment not fully paid when due. The appellants concede that they were rightfully required to pay, on redemption, the taxes levied in 1943, but they dispute the claim for interest on the 1943 taxes.

A good deal of argument was addressed by counsel for both parties as to what may be termed the equitable interpretation or application of the provisions of s. 4. If, however, the words of the statute are clear and unambiguous, effect must be given to them, regardless of any so-called equities. The County Judge considered that an owner against whose land the treasurer had registered a certificate under the Act would be given an undue advantage over an owner similarly in arrear with his taxes, but against whose land no certificate had been registered, if the former owner could redeem within a year without having to pay any interest or penalty in respect of that year, while the latter would have a percentage added to the amount owing. This, however, ignores the important fact that the former owner is deprived of his land (subject to the right to redeem) and the municipality becomes its owner and entitled to its rents and profits, on registration of the certificate. Registration is also wholly at the option of the municipality. It need not register if it considers the land unprofitable. In my opinion the terms in which subs. 1 of s. 4 is expressed do not present any great difficulty as to its proper interpretation.

Dealing first with the item of \$195.67, it will be seen that by s. 4 the owner seeking to redeem is to pay, firstly, the amount set forth in the registered certificate. That, as already stated, was \$3,441.51. Secondly, he is to pay the amount of all expenses incurred by the corporation and the treasurer in registering the certificates, and for searches and postage, and \$1.00 for each certificate, and for each notice sent under subs. 4 of s. 3. There is no dispute about this amount. It is agreed on at \$9.48. Thirdly, he is to pay "all taxes including the local improvement rates and interest thereon which would have accrued against the land if it had remained the property of the former owner and had been liable for ordinary taxation". It is here that contention arises.

The contention of the respondent is that if the land had remained the property of the former owner and had been liable for ordinary taxation, s. 147 of The Assessment Act would have operated, and there would have been added to the amount of

the taxes due and unpaid, as shown in the registered certificate, a percentage monthly. The respondent further points out that while in subs. 1 of s. 147, this percentage to be added is referred to as interest, yet by subs. 3 of the same section "Interest and percentages added to taxes shall form part of such taxes and be collected as taxes." The argument is, therefore, that the word "taxes" in the quotation I have made from subs. 1 of s. 4, of the special statute of 1932, should be deemed to include, not only ordinary taxes for the year 1943, but also the amount of \$195.67, as it is an amount which, by virtue of s. 147 of The Assessment Act, would also have accrued as taxes against the land as an addition to the \$3,441.51, the arrears mentioned in the registered certificate, if the land had remained the property of the former owner.

The natural place in which to provide for the payment, as part of the price of redemption, of interest on the amount of arrears stated in the registered certificate, would seem to be in immediate connection with the requirement that the owner should pay the amount set forth in the certificate. There is, however, a more direct, and, in my opinion, a more conclusive indication of the meaning the Legislature intended to be given to the words "all taxes" in that part of subs. 1 of s. 4 relied upon by the respondent, which I have already quoted, to be found in the words immediately following the words quoted. The subsection continues as follows: "and if the value thereof is not shown upon the assessment roll, *such taxes* shall be computed at the rate fixed by by-law for each year for which such taxes are payable upon the value placed thereon upon the assessment roll for the last preceding year in which it was assessed". It is impossible, I think, in view of this direction in the subsection itself as to the manner in which "*such taxes* shall be computed" in the event of the value thereof not being shown upon the assessment roll, to hold that interest under s. 147 of The Assessment Act shall also be included as part of "*such taxes*". The amount, therefore, that the appellants, on redeeming, were properly required to pay as taxes which would have accrued against the land, if it had remained the property of the appellants, and had been liable for ordinary taxation, should not have included, as taxes, interest on the amount shown in the registered certificate, notwithstanding anything contained in s. 147 of The Assessment Act.

The respondent contended alternatively that it was entitled to the amount of \$195.67 as "interest" coming within the words of the subsection, "all taxes including the local improvement rates and interest thereon". Attaching to the words "all taxes" the meaning that, in my opinion, they must here be given, it is obviously impossible to regard the sum of \$195.67 as "interest thereon". It was interest on the sum of \$3,441.51 set forth in the registered certificate.

The smaller item in dispute—\$6.90, for interest under the city by-law levying rates for the year 1943 on the instalments of taxes that would have been payable in 1943, and before the date of redemption, if the property had been liable for ordinary taxation as remaining still the owner's property—may be briefly disposed of. The appellants' contention is that it is only interest on the local improvement rates that is provided for, and not interest upon the current year's taxes. This part of the subsection is not very happily drafted. Local improvement rates are imposed by special by-law, and are imposed once for all for any one work, and not by annual assessment: *Ferguson et al. v. The City of Toronto*, [1944] O.R. 385, [1944] 3 D.L.R. 317. They are a charge on the land assessed for the cost of the local improvement work, from the time they are imposed: The Local Improvement Act, R.S.O. 1937, c. 269, s. 47. In fixing the amount of the annual instalments which each owner is to pay towards the cost of the work, the council is required to add a sum sufficient to cover the interest: *ibid.*, s. 52(2). Any further interest that may be added can only be added by the application of the provisions of The Assessment Act as to the collection and recovery of taxes, and the proceedings which may be taken in default of payment thereof, which are made applicable by s. 54 of The Local Improvement Act. Section 113 of The Assessment Act, which is by its terms expressly made applicable to the payment of local improvement assessments, as well as to the payment of ordinary taxes, authorizes the council to provide for the payment of taxes by instalments, and for either allowing a discount for punctual payment or adding a percentage for default in due payment of any instalment. It is, no doubt, by this process that any interest on local improvement rates contemplated by s. 4(1) of the special Act in question must be authorized. But by the same by-law interest on the ordinary taxes for the year would likewise be provided for. It seems to

me, therefore, that it must be taken to have been the intention of the Legislature that the words "and interest thereon" should have relation to both taxes and local improvement rates, as such interest must have the one origin. I would therefore, uphold the right of the municipality in this case to the small item of \$6.90.

The appellants should be held entitled to the recovery of \$195.67, in addition to the sum of \$253.15, which the respondent admits as an over-payment. The appellants are entitled to their costs of action and appeal.

Appeal allowed with costs.

Solicitors for the plaintiffs, appellants: Rodd, Wigle, Whiteside & Jasperson, Windsor.

Solicitor for the defendant, respondent: Lorne R. Cumming, Windsor.

[HOGG J.]

Blackstone v. The Mutual Life Insurance Company of New York.

Insurance—Disability Benefits—Total and Permanent Disability—Training of Insured—Burden of Proof—Disability Benefits Paid by Insurer and then Discontinued.

When an insurance policy, providing for benefits in the event of total and permanent disability, contains an express term to the effect that the total disability shall be presumed to be permanent if it continues for a prescribed period, and the insurer has paid the benefits for that period or longer, thereby admitting that the insured is totally and permanently disabled, then the insurer, if it wishes to escape making further payments, must establish that the disability has ceased. *Mutual Life Insurance Company of New York v. Lessard*, [1943] Que. K.B. 361, agreed with. This is so even where the policy expressly provides that the insurer shall be bound to pay only when it is satisfied that the insured is disabled, and when once the presumption has arisen the principle laid down in such cases as *Copeland v. Locomotive Engineers' Insurance Association* (1910), 16 O.W.R. 739; *Quinlan v. Empire Life Insurance Co.* (1929), 37 O.W.N. 417, and *Teur v. London Life Insurance Company* (1935), 43 Man. R. 393, is inapplicable.

Where total disability is defined in a policy as an inability "to follow a gainful occupation", or in similar words, it is not enough for the insurer to show that there is some occupation in which it might be possible for the insured to engage, with prospect of gain. Where the insured has had a substantial occupation before his disability arose, there must be a prospect of his engaging in some other substantial occupation, in which there is likelihood of his receiving an income reasonably comparable to that which he received before his illness. *Harding v. Prudential Insurance Co. of America* (1940), 7 I.L.R. 227; *Langley v. Fidelity Insurance Co. of Canada*, [1935] O.R. 424, agreed with.

AN action to recover disability benefits under policies of insurance issued by the defendant company. The facts are fully stated in the reasons for judgment.

8th, 9th and 10th May 1944. The action was tried by HOGG J. without a jury at Toronto.

F. Erichsen-Brown, K.C., and J. P. Erichsen-Brown, for the plaintiff.

H. C. Walker, K.C., for the defendant.

1st December 1944. HOGG J.:—The plaintiff seeks to recover from the defendant company certain disability benefits which he claims are due and payable to him according to the terms of nine policies of life insurance issued by the defendant company. Under the provisions of seven of these policies the plaintiff is entitled to a monthly income if he becomes totally and presumably permanently disabled before the age of sixty, and is entitled as well to a waiver by the defendant company of payment of premiums upon the said policies which may become due during such disability. In the remaining two policies the plaintiff is entitled only to the waiver of premiums.

For some years prior to May 1941, the plaintiff was a member of a musical organization in the city of Toronto called the Hart House Quartet, in which he played the viola. He had also certain other duties to perform in connection with the activities of the quartet, and he was paid a salary of \$6,000 per annum.

During the early part of the year 1941, the plaintiff states that he suffered to such an extent from pain and distress in the region of his heart while playing at concerts that by May of that year his condition had become such that he could no longer follow his profession, and he resigned from the quartet. In February 1941 the plaintiff had been advised by his physician, Dr. M. A. Pollock of Toronto, that he should give up his position as a concert artist with the quartet "and lead a quiet peaceful life, devoid of mental and physical strain." Dr. Pollock diagnosed the complaint as an aneurism of the aorta. X-ray photographs of the plaintiff's chest, made in April and August 1941, showed, according to the diagnosis of Dr. M. R. Hall of the Department of Radiology of the Toronto General Hospital, that there was the possibility of a diffuse enlargement of the aorta.

The plaintiff was also examined by Dr. John A. Oille and Dr. John Hepburn, both specialists in Toronto of high standing

in their profession respecting diseases of the heart and its connecting vessels.

In the year 1926 Dr. Oille had examined the plaintiff, who then complained of a pain in his chest, and had concluded that the plaintiff was not suffering at that time from any trouble of a serious nature. In August 1941 the plaintiff was referred to Dr. Oille by the defendant company for examination, as a result of which Dr. Oille came to the conclusion, although with doubt, that angina pectoris might be present and that an aneurism was a possibility. It seems clear that by this time the plaintiff had learned that it was considered by his physicians that he was suffering from an aneurism of the aorta and from angina pectoris. This fact is shown by his claim to the defendant company in July 1941, and Dr. Pollock had informed the plaintiff by his letter of the 23rd April 1941 that he had a serious heart condition. In his report to the defendant company of August 1941, Dr. Oille stated that he was unable to come to a definite conclusion with reference to the plaintiff "as to how much of his disability is due to suggestion and how much is due to actual disease", and Dr. Oille further said: "Then we have to consider that the disability produced by being told he has angina pectoris and an aneurysm, and that he must quit work, is sufficient, in many people, to produce an incurable, total disability."

In November 1941 Dr. Oille again examined the plaintiff, and in the course of his report to the defendant company he stated his opinion to be that the plaintiff was "very close to being totally disabled due to coronary insufficiency". Again, on the 30th December 1941, Dr. Oille reported to the defendant company that he was satisfied that the plaintiff was telling the truth regarding his condition and was of the opinion that the plaintiff was totally disabled at that time "for any available job."

Dr. Hepburn, as a result of his examination of the plaintiff in 1941, and due to what he had been informed by Dr. Oille, concluded that the plaintiff had degenerative heart disease due to arterial sclerosis of the coronary arteries and that there was a question whether angina pectoris, and some question whether an aneurism, might not be present.

As a result of the application of the plaintiff, and the reports upon his condition made by the several physicians who had examined him, the defendant company, in January 1942, commenced to pay the plaintiff disability benefit income under the

terms of the said policies, and refunded to him premiums paid between May 1941 and January 1942. In November 1942, the defendant company informed the plaintiff that there was doubt whether he was totally and permanently disabled in accordance with the terms of the policies, and notified him that it was not satisfied on the proofs presented that he was totally and permanently disabled. On or about the 21st November 1942 the defendant company refused to continue payment of the disability benefits and to waive further premiums payable with respect to the policies.

The plaintiff contends that he is still totally and permanently disabled within the ambit of the policies from following any gainful occupation, such disability being the result of a heart disease, or disease of certain of the vessels pertaining to the heart, and that he is, therefore, entitled to the benefits under the policies.

The provisions of the first three policies, material to the questions raised, are as follows:

"If the insured . . . is totally and presumably permanently disabled before age 60, the Company will pay to said Insured a monthly income of \$. . . during such disability, besides waiving premium payments under said Policy, all in accordance with the following provisions and conditions. *Total disability:* Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for said Insured to follow a gainful occupation. *Permanent disability:* Total disability shall, during its continuance, be presumed to be permanent; (a) If such disability is the result of conditions which render it reasonably certain that such disability will continue during the remaining lifetime of said Insured; or, (b) if such disability has existed continuously for ninety days. *When Benefits become Effective:* If . . . said insured shall furnish to the Company due proof that he is totally and permanently disabled, as defined above, the Company will grant the following benefits during the remaining lifetime of said Insured so long as such disability continues. *Benefits:* (a) *Income . . .* (b) *Waiver of Premium . . . General Provisions:* The Company may, before making any disability income payment or waiving any premium, require due proof of the continuance of total and permanent disability, but such proof shall not be required oftener than once a year after such disability has continued for two years. If such proof is not furnished on demand or if it

shall appear to the Company that said Insured is no longer totally and permanently disabled, no further disability income payments will be made or premiums waived."

The language respecting disability benefits in the fourth, fifth, and sixth policies is practically the same as in the first three. In the last three policies a change appears. Benefits shall be paid "If, while no premium on this Policy is in default, due proof is received at the Home Office of the Company in the City of New York (1) that the Insured is totally disabled as a result of disease or of bodily injury which was not self-inflicted, so as to be incapable of engaging in any occupation for remuneration or profit, . . . (2) that such total disability has continued without interruption for a period of at least four months (total disability of such duration being presumed to be permanent during its continuance), and (3) that such total disability commenced before the anniversary of the date of the Policy on which the age of the Insured at nearest birthday is sixty years . . ."

Total disability under the terms of the first six policies arose where there was an impairment of "mind or body," and in the last three policies where such disability was the result of "disease or bodily injury."

Disability on the part of the plaintiff, which entitled him to the benefit granted by the policies, was recognized by the defendant company for a period of six months, and, such being the case, the presumption that the disability was total and permanent was established in favour of the insured. The language of the disability clauses as a whole is to be considered in order to ascertain whether this presumption may under certain circumstances be held to be limited, or to have come to an end.

It was argued by counsel for the defendant that because the general provisions of the disability clause state that if it shall appear to the company that the insured is no longer totally and permanently disabled no further disability income payments will be made or premiums waived, the defendant company itself had the sole right to determine whether a disability benefit should cease to be paid. It was submitted that the decisions in such cases as *Braunstein v. The Accidental Death Insurance Company* (1861), 1 B. & S. 782, 121 E.R. 904; *Manby v. The Gresham Life Assurance Society* (1861), 29 Beav. 439, 54 E.R.

697; *Copeland v. Locomotive Engineers Mutual Life and Accident Insurance Association of Cleveland, Ohio* (1910), 1 O.W.N. 1089, 16 O.W.R. 739; *Quinlan v. Empire Life Insurance Co.* (1930), 37 O.W.N. 417, and *Teur v. London Life Insurance Company*, 43 Man. R. 393, 2 I.L.R. 693, [1935] 3 W.W.R. 368, [1936] 1 D.L.R. 161, in the Court of Appeal of Manitoba, should be followed. The judgments in the above-named cases are to the effect that an insured claiming disability benefits would have no right of action where the insuring company was given the right, by the policy, of deciding whether or not satisfactory proof of the claim of the insured person had been furnished, unless the company had acted unreasonably and capriciously in refusing to accept such proof. In fact, in *Copeland v. Locomotive Engineers*, where the policy comprised such a term, it was held that an insurer would have no right of action if disability benefits were ended, in the absence of fraud on the part of the insurer company.

The presumption in favour of the insured, once the circumstances have brought it into existence, is not, in my view, withdrawn by any of the further terms and conditions of the disability provisions, and it would require language of clearer and more decisive character, once the presumption arose, to bring into effect the principle laid down in the above-mentioned cases. The presumption in favour of the insured is not limited or affected, and when once it has been brought into existence the approval of the defendant company is not a condition precedent to his right to claim relief by action.

I agree with the conclusion of Barclay J. in *Mutual Life Insurance Company of New York v. Lessard*, in the Court of King's Bench, Appeal Side, of the Province of Quebec, [1943] Que. K.B. 361 at 364, 10 I.L.R. 252 at 255, where that learned judge said, in discussing clauses in a policy similar to those now under review:

"Once the permanency of the absolute incapacity is established by this presumption, the right of the company is limited to require proof of its continuation—in other words, proof that there has been no change. After 90 days of continuing incapacity the absolute incapacity is presumed to be permanent until it is shown to have ceased. It is not for the insured to prove that his incapacity has ceased. If the company suspects that it has, it may require valid proof of its continuation. If it is not

satisfied with such proof, it can refuse to pay and take the consequences of its refusal . . . The company's undertaking to pay under certain conditions is absolute and permanent, not conditional, and any failure to comply with its obligation can undoubtedly be enforced by action, if the insured has in fact complied with the terms of his policy."

I have therefore concluded that the onus rests upon the defendant to show that the plaintiff, in so far as any right he may have under the first six policies is concerned, is not suffering from any impairment of mind or body which continuously renders it impossible for him to follow a gainful occupation, and with respect to the last three policies, that the plaintiff is not totally disabled as a result of disease or bodily injury so as to be incapable of engaging in any occupation for remuneration or profit.

It has been held that the construction to be adopted, in an endeavour to ascertain the meaning of the language granting benefits under an insurance policy, must be that which is most advantageous to the insured: *Hooper v. The Accidental Death Insurance Company* (1860), 5 H. & N. 546, 157 E.R. 1297; and in *Shera v. The Ocean Accident and Guarantee Corporation Ltd.* (1900), 32 O.R. 411, Boyd C., referring to the terms of a policy of insurance, said, at p. 415: ". . . [If] the language and the context is [not] free from ambiguity . . . the more beneficial meaning may be invoked by the insured."

The policies do not protect the insured against such disability as prevents him from pursuing his usual occupation. There have been many cases decided in the several States of the United States of America upon the point at issue in this action and the Courts there are divided in their interpretation of the words "a gainful occupation". In *Waldman v. The Mutual Life Insurance Company of New York* (1937), 252 App. Div. (N.Y.) 448, Adel J. said, at p. 450, referring to the terms "gainful occupation" and "occupation for remuneration or profit" in the policies there under consideration, which were similar to those now before the Court:

"The total disability contemplated by the particular policies of insurance before this court which would justify recovery thereunder is an infirmity from bodily injury or disease that prevents the insured from following *any* substantial or remunerative occupation, or from doing *any* labor for which he is

fitted or qualified, mentally and physically, and by which he is able to earn a livelihood."

In some of the States of the Union the same interpretation is placed upon this phrase as if the policy were one against the loss of the insured's occupation. It was said in *Mutual Life Ins. Co. of New York v. Beckmann* (1935), 87 S.W. (2d.) 602 at 606, in the Court of Appeals of the State of Kentucky: "'Gainful occupation' means in this particular case, the occupation which the plaintiff was engaged in at the time the insurance was written, that of a banker, or similar occupation." This construction is not followed in a number of the other States, including the State of New York, as will be seen from the quotation from the judgment of Adel J. in the *Waldman* case.

In *Harding v. Prudential Insurance Co. of America* (1940), 7 I.L.R. 227, Chevrier J. quoted from the judgment of Bell J. in *Prudential Insurance Company of America v. South* (1934), 179 Ga. 653, 177 S.E. 499, 98 A.L.R. 781, who put the matter under discussion in the following words: ". . . the same livelihood, as the insured might fairly be expected to follow, in view of his station, circumstances, and physical and mental capabilities." See also per Henderson J. in *Langley v. Fidelity Insurance Co. of Canada*, [1935] O.R. 424 at 427, 2 I.L.R. 453, [1935] 4 D.L.R. 89.

Macgillivray on Insurance Law, 2nd ed., p. 1140, expresses the opinion that there would be no total disability if the insured was competent to carry on some substantial work or business and that the words "gainful occupation" must be given a reasonable meaning. I am of the opinion that the benefits would ensue to the plaintiff and he is to be classed as totally and permanently disabled if he is so disabled that he cannot engage in some substantial occupation, one which will bring him an income which will be reasonable in amount in relation to the income he received from the occupation he was compelled to discontinue, and one which falls within the language of Chevrier J. which I have quoted from his judgment in *Harding v. Prudential Insurance Co.*, *supra*.

In *Boroditsky v. Travelers' Insurance Company*, 45 Man. R. 457, [1937] 3 W.W.R. 665, [1937] 4 D.L.R. 653, an action upon an insurance policy, in the Manitoba Court of King's Bench, Dysart J., in construing the meaning of the words "from engaging in any occupation or employment for wage or profit" fol-

lowed the reasoning of Buckley L.J. in *Cardiff Corporation v. Hall*, [1911] 1 K.B. 1009, to the effect that it is the capacity of the insured for occupation or employment that is contemplated and not his chance of securing the same. I am not satisfied that the principle stated in *Cardiff Corporation v. Hall* is applicable to the policies now under discussion. In the *Cardiff* case there was under consideration the language of a section of The Workmen's Compensation Act, 1906 (Imp.), c. 58, and certain schedules thereto, by the provisions of which a workman was entitled to compensation after an accident. The question was, what interpretation should be placed upon the words "able to earn" after the accident, in the light of the words "incapacity for work" as a result of the injury. Buckley L.J. said, at p. 1026:

" . . . the question is, not whether the man can in the then state of the labour market get a place, but whether as a result of the accident he is under an incapacity for work which prevents him from being as eligible as he was before the accident for a place . . . inability to earn for the purposes of Sched. I, par. 3, is inability to get employment owing to some incapacity for work personal to the workman to the exclusion of inability to get employment owing to the state of the labour market. The employer may be called an insurer of 'capacity for work', but he is not an insurer of a 'right to work.' "

The words "impossible . . . to follow a gainful occupation", or "incapable of engaging in any occupation for remuneration or profit", are, I think, wider in scope than the words "able to earn" in conjunction with the words "incapacity for work". The language of the policies seems to me to signify that there should be taken into consideration, not only the actual physical incapacity on the part of the insured, but in addition the idea that the insured, on account of that incapacity, may not be able to secure work of a substantial nature or to obtain a substantial position.

It was argued on behalf of the defendant company that the evidence shows that it has satisfied the onus cast upon the defence by the presumption aforesaid, and further that there are a number of gainful occupations in which the plaintiff is capable of engaging.

A careful survey of all of the evidence directed to the exposition of the actual condition of the plaintiff and as to whether

or not he can now carry on a gainful occupation leaves these questions of very considerable difficulty. In the consideration of the issue whether the plaintiff can engage in a gainful occupation, it must be borne in mind that any special training he has had is wholly in connection with his former occupation as a musician and a concert artist.

The plaintiff has owned, since 1940, approximately three and a half acres of land in the Niagara district, with a house thereon, and on which are a number of fruit trees. He has used this place as a summer home, and has sold and disposed of the fruit. The plaintiff testified that at one time in the summer of 1942 he had made use of an axe to chop certain small roots and had also used a scythe for some five minutes to cut down weeds. There is evidence from the plaintiff himself and certain of his neighbours, and from persons who worked for him for a short time gathering fruit, that he helped to place certain ladders against the trees, and at times to lift baskets of fruit. There is evidence also that he had driven a motor car for a very considerable distance on a fishing trip. The plaintiff furthermore said, on his examination for discovery in April 1944, that he could walk about eight blocks without distress, while in August 1941 he had told Dr. Oille he could walk only four blocks.

Dr. Pollock's evidence, given at the trial, was to the effect that there had not been an improvement in the plaintiff's condition since May 1941.

Dr. Oille said that he was satisfied in 1941 that the plaintiff was totally disabled, his opinion of the plaintiff's condition being based upon the accuracy of the statements made by the plaintiff. Dr. Oille further said that the evidence given by the plaintiff that he could walk a further distance in April 1944 than he formerly could, and could use, and had used, an axe and scythe for a few minutes, must be considered in view of the fact that usually, tolerance of effort in cases of coronary insufficiency does not improve. Because of these facts, Dr. Oille said he was compelled to modify his former opinion of the plaintiff's condition, and now considered the plaintiff's actual physical disability to be not more than forty or fifty per cent. Dr. Oille expressed the opinion that the plaintiff's "worst trouble is his idea of the seriousness of his disease."

Dr. Rykert, who gave evidence on behalf of the defendant company, testified that his opinion in November 1942 of the

plaintiff's condition—which was based solely upon the statements made by the plaintiff, in other words on his history—due to the fact that no objective symptoms were present, was that his exercise tolerance would allow the plaintiff to do work of a very light clerical nature for only a few hours each day. Dr. Rykert was now of the opinion, based upon the activities in which the plaintiff had testified at the trial he had taken part, that the plaintiff's exercise tolerance was fair. Dr. Rykert stated that either he had not been given the whole picture by the plaintiff or the plaintiff's exercise tolerance had improved. He further said that the plaintiff could be, although it was not usual, totally disabled by neuro-circulatory asthenia which might exist alone or in conjunction with heart disease. Dr. Rykert was not able to say whether the plaintiff could now carry on his ordinary occupation, as emotional stress might be involved, but if such stress were not present the plaintiff should be able to do so.

The plaintiff was examined again in January 1943 by Dr. Hepburn, when the plaintiff said the pain he suffered from was more severe than in 1941, and that his ability to walk varied to a considerable extent, as on some days he said he was very short of breath on walking and had to stop on that account or on account of pain, or for both reasons. Dr. Hepburn was of the opinion, as he testified at the trial, that if the plaintiff's story was accurate, he had heart disease, or to express it more accurately, disease of the blood vessels pertaining to the heart, of a serious degree, with again the presence of angina pectoris queried. On the 1st February 1943, Dr. Hepburn wrote to the plaintiff to the effect that he (the plaintiff) had degenerative heart disease which prevented him from leading a normal life, and which was not likely to improve. In July of the same year Dr. Hepburn thought, as is shown by a letter from him to an official of the defendant company of the 24th July 1943, that the plaintiff should try to rehabilitate himself in work other than that of concert work. In his evidence given at the trial, Dr. Hepburn explained that he referred to the plaintiff's profession as a musician. A further examination of the plaintiff was made by Dr. Hepburn in September 1943, when, from the symptoms related by the plaintiff at that time, and taking the plaintiff's story as correct, he was entirely satisfied the plaintiff had serious coronary disease with angina pectoris being questionable. As he

said at the trial, Dr. Hepburn's diagnosis of coronary disease or angina pectoris depended entirely on the accuracy of the history of complaints and symptoms given by the plaintiff, as there were no objective signs other than a shadow at the left lung root, concerning which the radiologists expressed the opinion it might indicate an aneurism. Dr. Hepburn was of the opinion that the plaintiff without doubt could engage in a quiet sedentary occupation with no emotional disturbance, and that the plaintiff's activities at his summer place were not inconsistent with the presence of heart disease. The doctor stated that he would be surprised if the plaintiff could not play upon a violin without disturbance, unless prevented by the great emotional strain which seemed to accompany such activity.

The plaintiff, at the request of the defendant company, was examined by Dr. Paul White, an eminent heart specialist of the city of Boston, in the United States. Dr. White forwarded his report, made as a result of the examination, to Dr. Hepburn, and Dr. O'Brien, an officer of the defendant company, requested Dr. Hepburn's comments upon this report. Counsel for the plaintiff, having called Dr. Hepburn as a witness, asked him to produce the report made by Dr. White, and tendered it as evidence on behalf of the plaintiff, on the ground that as there had been a request by the defendant for the opinion of Dr. Hepburn with respect to Dr. White's report, therefore the circumstances surrounding the use of the report took it out of the general rule and allowed it to be admitted as evidence. The admission of this report was objected to by counsel for the defendant, and it was put in subject to objection.

My understanding of the rule of evidence referable to the question under consideration, is that oral or written statements made by persons not called as witnesses are not receivable in evidence to prove the truth of the facts stated except in certain limited circumstances, for the reason that such statements are hearsay and because there is the absence of an oath and of cross-examination. One of the exceptions to the rule is where the statement is made by a party to the proceedings or is made by a person who is an agent of such party authorized to represent the principal in any business or transaction, and is made in the ordinary course of such business or transaction, and such statement or admission is against the interests of the person

who has made it, or for whom it was made: Phipson, Manual of Evidence, 1938 ed., pp. 98 *et seq.*

I do not think Dr. Hepburn or Dr. White can be considered to be agents of the plaintiff or of the defendant company respectively. If Dr. White had been called as a witness, and his report had then been produced while Dr. White was under examination, it would have been admissible: *Fleming v. Toronto R.W. Co.* (1911), 25 O.L.R. 317 at 325.

I have concluded that Dr. White's report is not admissible, and I have not given it consideration in my disposition of the action.

Certain interesting testimony was given by Miss Kathleen Parlow, who is recognized as an outstanding artist upon the violin. She said that a very great strain, both physically and mentally, was involved in performing as a concert artist. Also that the teaching of music was, physically, a difficult occupation.

I have come to the conclusion that although, in the opinion of some of the physicians, the plaintiff's actual physical condition is not as serious as they concluded it was in 1941, it is not at all certain that the plaintiff is not suffering from disease of the coronary vessels connected with the heart, and the evidence of the physicians as a whole suggests that the plaintiff is totally disabled from carrying on his ordinary vocation because he firmly believes that he has a serious form of heart disease. It is true that there is a seeming inconsistency in the evidence given as to the plaintiff's exercise tolerance when the history of what he could not do as told by him in 1941 is compared with the things he has done since that time. I think the physicians who gave evidence at the trial were justified in stating that their former conclusions had been modified by the evidence they had heard at the trial of the plaintiff's activities, but there is no definite or concrete reversal of their former opinion that the plaintiff is suffering from an impairment of health which prevents him from engaging in his former occupation or in any substantial one for which he is adapted by training. I do not think there is sufficient in the evidence to find that the plaintiff wilfully held back, from the physicians who examined him, facts, with reference to his condition or his activities, that he should have related to them, or that he did not tell them what was true. His evidence must be accepted on this point, or rejected, and I do not think there is sufficient ground to reject it. Those who

examined the plaintiff were apparently impressed by his good faith. In the view of Dr. Hepburn the evidence of certain acts done by the plaintiff at his summer place are not inconsistent with coronary heart trouble. It is also apparent from the evidence that emotional stress may play a considerable part in whether the plaintiff can engage in his former occupation or in any other occupation for which he might possibly be fitted. In this connection there is evidence given by Miss Parlow regarding the severe strain involved in playing upon the viola or violin, either in public or in teaching. I think that in the case of the plaintiff the effect of the policies in question approaches somewhat closely to that pertaining to what are termed occupational policies. He has no training or aptitude, so far as the evidence shows, for any other occupation, except one intimately associated with the profession of music. I think it can be properly said that the evidence with regard to his ownership of some three acres of fruit trees does not show that he can do the work of a fruit farmer, or that, if he could, he could make any appreciable profit from this land.

Dr. Oille fixed the plaintiff's disability at from 40 to 50 per cent., which indicates an opinion that the plaintiff is suffering from considerable bodily impairment. Even an actual disability of from only 40 to 50 per cent. may, I think, be held to be a total permanent disability in so far as the plaintiff's ability is concerned to take up again his old occupation, or to engage in, or to obtain, an occupation for which he would be fitted, that would be substantially the same in so far as gain is concerned, as the one in which he was formerly engaged.

I have come to the conclusion that the evidence as a whole leads to a finding that the plaintiff is totally and permanently disabled due to impairment of body, so that his condition comes within the terms of, and he is entitled to the benefits provided by, the policies. The emotional stress which apparently plays a considerable part, in respect of the plaintiff's condition, is not, as I understand the evidence, due to any impairment of the plaintiff's mind. There will be judgment for the plaintiff as claimed for refund of premiums and disability benefits income and costs. The plaintiff has not made efforts to find other employment, but I do not think it is incumbent on him to do so, the onus having been placed upon the defendant company to

establish that it was justified in discontinuing the benefits under the policies to the plaintiff.

Judgment for plaintiff.

Solicitors for the plaintiff: Erichsen-Brown & Strachan, Toronto.

Solicitors for the defendant: Blake, Anglin, Osler & Cassels, Toronto.

[COURT OF APPEAL.]

Fetherston v. Neilson and King Edward Hotel (Toronto) Limited.

Costs—Two Defendants Sued—Plaintiff Successful against One Defendant only—Appeal—Contribution.

The plaintiff's violin was damaged by the fall of a pillar while the plaintiff was playing at a dance in a hotel owned and operated by H. Co. One N., one of the guests, admitted that he had jostled against the pillar immediately before it fell, and information was given to the plaintiff that a man had been seen leaning against the pillar (in a place where he had no right to be) just before the fall. The plaintiff sued N. for damages. N., in his statement of defence, denied negligence, and alleged that the pillar had fallen by reason of defective construction, and other negligence of H. Co. The plaintiff thereupon obtained an order adding H. Co. as a party defendant. H. Co., in its statement of defence, alleged that the negligence of N. was the sole cause of the damage. At the trial, the plaintiff recovered judgment against both defendants. N. appealed, and H. Co., as a respondent, joined in attempting to uphold the trial judgment. The appeal was allowed, and the action was dismissed as against N., on the ground that there was no evidence justifying a finding of negligence against him.

Held, the plaintiff had acted reasonably in suing N. as well as H. Co., and was therefore entitled to recover from H. Co. the costs which he was compelled to pay to N., for all matters subsequent to the joining of H. Co. as a party defendant. The proper order as to costs was that N. should recover his costs of the action, down to and including the action, against the plaintiff, and his costs of the appeal against both respondents; that the plaintiff might add to his costs of the trial, against H. Co., so much of the costs payable by him to N. as was incurred after the joinder of H. Co.; and that the plaintiff was entitled, as against H. Co., to contribution to the full extent of any costs of the appeal which he might pay to N.

Judgment of McFarland J., *ante*, p. 470, varied.

AN appeal by the defendant Neilson from the judgment of McFarland J., *ante*, p. 470, [1944] 4 D.L.R. 292. The facts are fully stated in the reasons of the trial judge, and in the reasons now reported.

8th and 9th November 1944. The appeal was heard by ROBERTSON C.J.O. and ROACH and MCRUER JJ.A.

G. T. Walsh, K.C., for the defendant Neilson, appellant.

R. N. Starr, for the plaintiff, respondent.

W. Judson, for the defendant hotel company, respondent.

At the conclusion of the argument, THE COURT delivered judgment orally, allowing the appeal with costs, and dismissing the action, as against the defendant Neilson, with costs, on the ground that there was no evidence on which a finding could properly be made that the appellant was legally responsible for the plaintiff's damages. The only evidence against him, to the effect that some action or motion of his had caused the pillar to fall, was evidence that, while dancing with a partner, he was pushed or jostled by some person unknown. That could not be translated into an admission that the appellant was on the platform, or identified with the evidence of the plaintiff's witnesses than a man had been standing on the platform with his arm around the pillar. No person who saw the man on the platform had identified him as the appellant. This being so, it followed that the appellant was not legally responsible for the consequences of the pillar's fall. On the question of costs as between the plaintiff and the defendant company,

Cur. adv. vult.

4th December 1944. The judgment of the Court was delivered by

ROACH J.A.:—This is an action in which the plaintiff claims for damages caused to his violin in the following circumstances:

The plaintiff, a violinist, was a member of an orchestra which was playing at a New Year's Eve dancing party at the King Edward Hotel in Toronto on the night of 31st December and the morning of 1st January last. The orchestra was seated on a platform at one end of the room, and the dance floor was immediately in front of this platform. The defendant Neilson was a guest at the party. An ornamental pedestal or pillar had been constructed on the edge of the platform next to the dance floor. While dancing was in progress, this pillar fell and struck the plaintiff's violin, causing considerable damage to it.

When the plaintiff commenced this action he did not make the hotel company a defendant, but claimed against Neilson only, alleging that Neilson had come on to the platform, where he had no right to be, and had either negligently or deliberately pushed the pedestal over, upon the plaintiff and his violin.

The defendant Neilson, in his statement of defence, denied that he had ever been on the platform, and alleged that if the pedestal fell by reason of any contact on his part with it, such

contact was involuntary and accidental and caused by his being jostled or pushed against it while dancing, by persons unknown to him. He further alleged that the pedestal was unsafe, in that it was placed almost at the edge of the platform, and was top-heavy and not properly braced and secured to the platform; that the room was overcrowded, and not sufficiently lighted, and that the pedestal fell due to these causes and the negligence, if any, of other persons unknown to him and that he was in no way negligent.

Having been served with this statement of defence, the plaintiff, with reasonable promptness moved before the Master for an order adding the hotel company as a party defendant. This order was made, and then the plaintiff amended his statement of claim and claimed that the damages sustained by him were caused by the negligence of both defendants. As against the hotel company the negligence claimed was substantially that set up by Neilson in his statement of defence.

The hotel company in its statement of defence denied the negligence alleged against it and that it was in any way negligent, and alleged that the sole cause of the damage to the plaintiff was the negligence of the defendant Neilson as alleged against him by the plaintiff.

The action came on for trial before McFarland J., without a jury. The learned trial judge held that both defendants were negligent and that their negligence caused the plaintiff's damages.

As against Neilson he found as a fact that Neilson was on the platform with his arm around the pedestal and that his position and the pressure exerted by him against it caused it to fall.

As against the hotel company the learned trial judge found that the "fastening of the pillar to the base was quite flimsy; that the whole fixture was entirely unsuited for use in a crowded dance-hall where it was quite certain that the dancers would come into contact with it", and that "during the dancing crowding and jostling were very great indeed."

The learned trial judge assessed the plaintiff's damages at \$750, and apportioned the negligence 70 per cent. to the defendant Neilson and 30 per cent. to the defendant hotel company.

The defendant Neilson appealed to this Court against the judgment of the learned trial judge. The defendant hotel company did not appeal.

At the conclusion of the argument on the appeal this Court held, with great respect to the learned trial judge, that there was no evidence upon which to base the finding of fact that Neilson had been on the platform or that he had his arm around the pillar or that he was in any way negligent. Accordingly the appeal was allowed with costs and this Court directed that the action as against the appellant should be dismissed with costs.

The question then arose as to who should ultimately bear the costs, that is whether or not the plaintiff should be entitled to any relief over against the hotel company for the costs payable by him to Neilson. Judgment was reserved on that question, and counsel for the plaintiff and the defendant hotel company have submitted written argument.

Section 26(1) of The Judicature Act, R.S.O. 1937, c. 100, enacts that:

"The Court upon an appeal may give any judgment which ought to have been pronounced and may make such further or other order as may be deemed just."

And s. 75(1) provides that:

"Subject to the express provisions of any statute, the costs of and incidental to all proceedings authorized to be taken in court or before a judge shall be in the discretion of the court or judge, and the court or judge shall have full power to determine *by whom and to what extent* the costs shall be paid."

It follows that the disposition of the costs throughout as between all the parties is open to this Court.

Unquestionably the successful appellant should have his costs of the trial against the plaintiff. Whether or not the plaintiff should have relief over against the defendant hotel company for those costs depends upon whether or not the plaintiff acted reasonably in suing the defendant Neilson.

In *Besterman v. British Motor Cab Company, Limited*, [1914] 3 K.B. 181 at 187, Vaughan Williams L.J., dealing with this subject, puts the matter thus:

"The proper way is—do not join any defendant unreasonably; if the facts are such that it is reasonable to join them both and reasonable to be in a state of uncertainty as to which of the two is the really guilty one, then it is part of the reasonable costs of the action that the costs of the action which you have launched against one of those defendants, and who has succeeded in defending himself, should be borne by the man

who is to blame. There is no rule in the matter; each case must turn on its own circumstances".

Having stated the facts in that case he continues: "In this particular case we really have pretty ample evidence from both defendants that it was reasonable to join them both because each blamed the other. I do not say that they gave notice of the blaming; but in fact each, when the trial came off, tried to put the blame on the other."

In the case at bar the loss suffered by the plaintiff could not be said to be due to inevitable accident or anything of that sort. Some one was to blame. The plaintiff did not see what caused the pillar to fall. In the confusion which followed its falling, information was conveyed to him that just before it fell or at the time that it fell a man had been seen on the platform with his arm around the pillar and leaning against it. There was another apparently similar pillar at the opposite front corner of the platform. Nothing happened to it. It was not unreasonable for the plaintiff to conclude that the man who leaned against the pillar had caused it to fall. The problem was to find that man.

Neilson was accosted in the crowd, and admitted that it was his coming into contact with the pillar which caused it to fall, but he claimed that he did not come in contact with it voluntarily and that he had been jostled against it by some other person or persons during the dancing. When he was accosted he had removed a paper hat which he was wearing when he collided with the pillar, and that and other circumstances led to the suggestion that he was attempting to hide in the crowd to escape detection.

If the plaintiff in the first instance had sued the hotel company only, and that defendant, in addition to denying negligence on its part, had placed the blame on Neilson, then in my opinion the plaintiff, in view of that plea and the additional information he already had, would have been justified in adding Neilson as a party defendant.

In the circumstances I think it would have been reasonable for the plaintiff to have sued both defendants in the first instance so they would both be before the Court and so that he would have the opportunity of having the whole matter investigated and the blame put where it belonged. The fact that he chose to sue Neilson only in the first instance does not stamp his conduct in the action toward that defendant as less reasonable.

Surely the hotel company cannot be heard to argue that the plaintiff acted unreasonably in suing Neilson, because the hotel company by its plea sought to put the full blame on Neilson.

The plaintiff, therefore, is entitled to relief against the defendant hotel company for so much of the costs of the trial payable by him to the defendant Neilson as were incurred subsequent to the hotel company being added as a party defendant.

Of course the appellant should have his costs of the appeal against the plaintiff respondent. Should he also have them against the hotel company respondent? I think he should. On the appeal the plaintiff and the hotel company made common cause. They sought with equal vigour to support the judgment at the trial to the extent that it was based on a finding of negligence against Neilson. They supported it for different reasons: the plaintiff because he wanted to retain it against both defendants; the defendant hotel company because it wanted to retain its right to contribution and indemnity against its co-defendant.

In *Re Hammond*, [1935] O.W.N. 1, [1935] 1 D.L.R. 263, affirmed [1935] S.C.R. 550, [1935] 4 D.L.R. 207, this Court, per Middleton J.A., held that where a respondent has made common cause with the appellant and the appeal is dismissed, this respondent as well as the appellant may be ordered to pay costs.

In the circumstances the proper order as to costs therefore is, that the defendant Neilson should recover his costs of the action down to and including the trial against the plaintiff, and his costs on the appeal against the plaintiff and the defendant hotel company; that the plaintiff may add to his costs of the trial against the defendant hotel company so much of the costs of the trial payable by him to the defendant Neilson as were incurred subsequent to the hotel company being added as a party defendant; and that the plaintiff is entitled as against the hotel company to contribution to the full extent of any costs of the appeal which he may pay to the appellant.

Order accordingly.

Solicitors for the plaintiff, respondent: Starr, Hall & Starr, Toronto.

Solicitor for the defendant Neilson, appellant: Harvey Obee, Toronto.

Solicitors for the defendant company: Daly, Thistle, Judson & McTaggart, Toronto.

[COURT OF APPEAL.]

The Huron and Erie Mortgage Corporation v. Longo.

Execution—Stay—Jurisdiction of Court—Motion in Action based on Facts Occurring after Judgment—Rule 523.

Mortgages—Remedies of Mortgagee—Cumulative Remedies—Exercise of Power of Sale after Issuing Execution under Personal Judgment on Covenant.

A mortgagee sued its mortgagor under the covenant in the mortgage, obtained judgment, and issued execution thereon. Subsequently, it sold the mortgaged lands under the power of sale in the mortgage, crediting the amount realized on the execution in the sheriff's hands. The mortgagor then moved, in the action, for an order setting aside the execution, on the ground that the mortgagee, by exercising the power of sale, had exhausted its remedies, and was no longer entitled to enforce the personal judgment by execution. Barlow J. held against the mortgagor's contention and dismissed the motion, but directed that the mortgagor, if he wished, might have an accounting in the Master's office of the amount still owing. The mortgagor appealed.

Held, the appeal should be dismissed, except that the provision for an accounting should be struck out of the order made by Barlow J.

Per Henderson and Laidlaw JJ.A.: The Court had no jurisdiction to entertain the motion, or to interfere, after judgment, with the plaintiff's right to enforce its judgment by execution. There was no inherent jurisdiction so to act, nor was such jurisdiction given either by statute or by the Rules of Practice. *Emerson et al. v. Fisher et al.*, [1944] O.W.N. 375, applied.

Per Gillanders J.A.: There was jurisdiction to entertain the motion. Facts arising subsequent to judgment might have formed the basis of an action to suspend the operation of the judgment, and, that being the case, Rule 523 was wide enough to authorize the seeking of the same relief by motion in the action. *Leonard v. Wharton* (1921), 50 O.L.R. 609; *Emerson et al. v. Fisher et al.*, *supra*, distinguished. On the merits, however, the conclusion and reasons of the judge below were correct, except that no accounting should have been ordered, since none was asked for in the notice of motion and there was nothing in the material to indicate that an accounting was desirable at this stage.

Judgment of Barlow J., *ante*, p. 424, affirmed.

AN appeal by the defendant from the order of Barlow J., *ante*, p. 424, [1944] 3 D.L.R. 742. The facts are fully stated in the reasons of Barlow J. and in the reasons now reported.

7th and 9th November 1944. The appeal was heard by HENDERSON, GILLANDERS and LAIDLAW JJ.A.

At the outset, the Court raised the question of the jurisdiction of Barlow J. to make the order sought, and argument was called for on this point.

R. S. Joy, for the defendant, appellant: There is an inherent jurisdiction in the Court to deal with its own process: *Dowker et al. v. Thomson*, [1941] O.R. 44, [1941] 2 D.L.R. 141; The Judicature Act, R.S.O. 1937, c. 100, s. 15(f). [LAIDLAW J.A.: That section was discussed in *Emerson et al. v. Fisher et al.*,

[1944] O.W.N. 375, [1944] 2 D.L.R. 803.] [HENDERSON J.A.: That section applies to a stay of proceedings, which is not what you are asking for here.] The Court cannot stay execution after final judgment has been given in an action: *Leonard v. Wharton* (1921), 50 O.L.R. 609, 64 D.L.R. 609; *Emerson et al. v. Fisher et al.*, *supra*. But there is a distinction between staying an execution and setting it aside: *Chambers v. Kitchen* (1894), 16 P.R. 219; *Grainger v. Order of Canadian Home Circles* (1918), 44 O.L.R. 53.

W. S. Sewell, for the plaintiff, respondent: There is a distinction between merely staying an execution and setting it aside *in toto*. Rule 523 is not applicable to this case. The proper procedure would have been for the defendant to bring an action.

Without deciding the question of jurisdiction, the Court then heard argument on the merits of the appeal.

R. S. Joy, for the defendant, appellant: Since the respondent is no longer able to reconvey the mortgaged premises, it cannot enforce its judgment obtained in the action, or any part thereof. Judgment on the covenant having been obtained before the sale under power of sale, the respondent is not entitled to give credit on this judgment and maintain his writ of execution for the balance, namely the deficiency. [HENDERSON J.A.: It seems to me that all you are entitled to is to have the sheriff enter a credit on the amount already paid and the balance of the execution should be allowed to stand.] The rights of the appellant to redemption arising from the judgment on the covenant, and renewed from time to time by the execution in question, have never been terminated by any order of the Court, or otherwise, and therefore are at least equal to those of a defendant, who is asked for the deficiency after a final order of foreclosure. The judgment in this action gave the appellant a right of redemption under the cases, which continued as long as the respondent chose to enforce the execution or any part of it. Since the respondent can no longer reconvey the mortgaged premises, the Court will restrain it from any demand for payment on the judgment: *Palmer v. Hendrie* (1859), 27 Beav. 349 at 351, 54 E.R. 136; *Kinnaird v. Trollope* (1888), 39 Ch. D. 636 at pp. 641, 642. [HENDERSON J.A.: I do not see that you have a right to redeem after the properties are sold and a deficiency remains under the judgment.] Does a subsequent sale under power of

sale have the same effect as a final order of foreclosure? Does that cut out our right of redemption? In my view it does not destroy our right of redemption. [LAIDLAW J.A.: I cannot appreciate an argument that the right to redeem depends solely on a judgment on the covenant.] The appellant had no right to redeem until he was sued on the covenant. At the time the writ on the covenant was issued the appellant had no right to redeem. [GILLANDERS J.A.: When the mortgagee proceeds under the power of sale provisions in the mortgage, he parts with the property. He does not retain both the property and the money.] [HENDERSON J.A.: By parting with the property, can you prevent a man from collecting his debt?] [LAIDLAW J.A.: If you have a right to redeem must you not exercise it before the sale of the property?] The appellant is in the same position as if the respondent had foreclosed and then sold the property. [GILLANDERS J.A.: When a mortgagee forecloses, he takes the property in settlement of the debt.] Our right to redeem still existed after the sale. The mortgage debt in this action is merged in the judgment, which by its terms imposes on the respondent the liability to reconvey on payment, and it therefore cannot enforce the judgment because of inability to comply with such terms: *Wilson v. Campbell* (1893), 15 P.R. 254. The appellant's position is that a sale under power of sale does not cut him out as a final order of foreclosure would have done: *Dowker et al. v. Thomson*, [1941] O.R. 44, [1941] 2 D.L.R. 141.

W. S. Sewell for the plaintiff, respondent: The case of *Kinnaird v. Trollope* (1888), 39 Ch. D. 636, is not authority for the proposition advanced. There is no case with facts exactly like the ones in the case at bar. The respondent has not claimed, or obtained, foreclosure, and has never owned the mortgaged premises, so that no question of ability to reconvey arises. There is a fundamental distinction between what is argued on behalf of the appellant and the true position in this case. At no time did the respondent become the owner in the course of the sale proceedings. The title in the property passes by the action of the mortgagee, not through the mortgagee. The only cause of action merged in the judgment was the claim on the covenant to pay, and so long as the judgment remained unsatisfied, the respondent could enforce any concurrent remedies: *Reid v.*

Batty et al., [1933] O.W.N. 496; Falconbridge on Mortgages, 3rd ed., pp. 687, 688 and 723. Since the sales under power of sale did not yield a sufficient amount to satisfy the debt for which it had secured judgment, the respondent is entitled to hold judgment and execution for the unpaid balance: *Gordon Grant and Company, Limited v. Boos*, [1926] A.C. 781; *Shields v. Shields* (1918), 43 O.L.R. 111, 44 D.L.R. 763. From the earliest days this practice has been authorized. If the right to an accounting is to be demanded, it should be conditional upon security for costs, in case the officer taking accounts finds everything in order.

R. S. Joy, in reply: The appellant is in the same position as if the mortgagee had foreclosed, and sold after the foreclosure proceedings. The respondent cannot claim on the covenant. [HENDERSON J.A.: The whole basis of your claim is that the respondent has lost the power to re-convey the property, and accordingly cannot collect the money.]

Cur. adv. vult.

29th November 1944. HENDERSON J.A.:—An appeal by the defendant from an order of the Honourable Mr. Justice Barlow, dated 29th June 1944, dismissing a motion made in Weekly Court by the appellant for an order that the execution issued in this action to the Sheriff of the County of York be set aside.

The facts are simple and are not in dispute.

In the year 1929 the appellant was the owner of four properties which he mortgaged to the plaintiff. Subsequently, but prior to the commencement of this action, the defendant conveyed to various purchasers his equity of redemption in the said properties.

This action was commenced by writ of summons on the 2nd day of April 1938, and was brought upon the covenant for payment of the mortgage moneys, and judgment herein was signed on 13th June 1938, for \$23,088.71 and \$73.50 costs, and execution was issued thereon and has been continuously renewed. During the years 1941 and 1942 the respondent sold the lands under the powers of sale contained in its said mortgages, and no question is raised as to the regularity of these proceedings, which realized some \$18,000, for which credit has been given to the appellant upon the execution in the sheriff's hands.

The learned judge in the court below entertained the motion, but refused to set aside the execution, and in lieu thereof gave to the appellant a reference to the Master at Toronto to take accounts to ascertain the balance owing on such execution after crediting the amounts received by the respondent by way of purchase money from the sale of the mortgaged properties.

In my opinion the Court is entirely without jurisdiction to entertain this motion.

In argument it was suggested that Rule 523 authorized such a motion. To this I cannot agree. It is also suggested that it is within the inherent jurisdiction of the Court to entertain applications in all proceedings in the Court. This general statement may or may not be true, but in any event I can find no authority, and none has been put forward, for this proceeding. With respect I do not think that there is any jurisdiction upon such a motion to grant a reference, nor does it appear that the appellant sought a reference. Upon the hearing, however, we heard argument upon the merits apart from the question of jurisdiction. I am unable to understand Mr. Joy's argument. He argues that the respondent, by bringing this action upon the covenants contained in the mortgages, created a right of redemption in the appellant. I cannot agree with this. A mortgagor always has a right of redemption, from the moment the mortgage is made, as soon as the moneys fall due. In this case the appellant parted with his right of redemption, and I do not see how it can be restored to him.

It is true, as argued, that a mortgagee cannot have the land and his mortgage money too. If he exercises his right of foreclosure and takes a final order, the mortgagee has taken the land for his debt, but no such proceeding was taken here. The mortgagee took proceedings under the powers of sale contained in its mortgages, and realized what it could from the sale of the lands, and any balance unpaid is still owing to it. It is not alleged that there was any irregularity in the suit in which judgment was recovered, or in the sale proceedings.

For these reasons the provision for an accounting should be struck out of the order appealed from and the appeal should be dismissed, with costs here and below.

GILLANDERS J.A.:—The facts are fully set out in the opinion of the other members of this Court, and in the reasons of the

trial judge reported in [1944] O.R. 424, and need not be repeated. When this appeal came on for hearing the question of the jurisdiction of the Court appealed from to entertain this motion was raised by the Court, and, counsel desiring an opportunity to consider this, the hearing of the appeal was adjourned until a later date.

What the appellant alleges, in effect, is that by reason of matters arising subsequent to the delivery and issue of judgment in this action, the operation of the judgment should be suspended. No attack is made upon the regularity of the judgment or the writ of execution issued thereon. The question now raised was not available as a defence in the action, or adjudicated upon therein.

Apart from whether the appellant could have succeeded in such a claim, the question is one in respect of which, apart from Rule 523, he might, if so advised, have maintained an action seeking to suspend the operation of the judgment. If it had been alleged that the judgment had been satisfied by some valid agreement between the parties, or, as here, that it was satisfied in law by other steps or proceedings taken by the respondent subsequent to judgment to recover the same debt, I would think that such matters might be made the basis of an action.

The specific relief sought in the notice of motion is to set aside the writ of execution and for such further or other order as may seem just. Execution is only in aid of the judgment. It is "the process by which the court enables the successful party to obtain actual possession of the thing recovered by its judgment and decree": per Spragge V.C. in *Gamble v. Howland* (1852), 3 Gr. 281 at 308.

The circumstances here may be distinguished from those in *Leonard v. Wharton* (1921), 50 O.L.R. 609, 64 D.L.R. 609, and *Emberson et al. v. Fisher et al.*, [1944] O.W.N. 375, [1944] 2 D.L.R. 803. In those cases the applicants were asking the Court to stay executions, and it was held that the Court did not, under the circumstances, have jurisdiction to interfere with the unconditional and unqualified right to enforce a judgment by way of execution, given by Rule 538. The matters urged there were not questions in respect of which the applicants could have maintained actions. The applicants were asking the Court to exercise a discretion which it was held the Court did not

possess. In the case at bar the appellant alleges that, as a matter of law, by reason of steps taken after judgment, the respondent has disentitled itself to proceed further. As intimated, I think this is an issue in respect of which he might have maintained an action, and, by virtue of Rule 523, he may now move in the action for the relief claimed, which is, in effect, that the operation of the judgment should be suspended.

Considered on the merits, I am in agreement with the conclusion of the trial judge that the appellant is not entitled to the relief asked, and for the reasons he has given.

It being admitted that if a mortgagee sells under a power of sale in a mortgage he may subsequently take proceedings on the covenant to recover any deficiency, I can see no reason in law or equity why the mortgagee here should not be entitled to continue proceedings for the deficiency existing after exercising its power of sale. The exercise of the power of sale extinguished the equity of redemption. The inability to reconvey arose from the default of the mortgagor.

By the judgment in appeal the appellant was given the right to an accounting. This was not asked in the notice of motion, nor was any reason given on the argument of the appeal to indicate that an accounting was necessary or desirable. On the material before the Court on this application it is not desirable to make any provision for an accounting, and the provision to this effect in the order below should be stricken out. Subject to this, the appeal should be dismissed with costs.

LAIDLAW J.A.:—The defendant appeals from an order made by Barlow J., dated the 29th day of June 1944, whereby he dismissed an application to set aside an execution issued to the Sheriff of the County of York, and directed a reference to the Master at Toronto to take accounts to ascertain the balance owing on such execution.

The facts leading to the application must be stated. The plaintiff claimed from the defendant certain moneys alleged to be owing under covenants contained in certain mortgages. No defence was filed to an action commenced by the plaintiff, and judgment was signed on the 13th day of June 1938 for the amount claimed. Execution was issued on such judgment and filed with the Sheriff of the County of York on the 15th June

1938. The execution was thereafter renewed and refiled from time to time and is presently in force.

The plaintiff sold part of the lands in 1941, and the balance in 1942, under powers of sale contained in the mortgages, and at the time of filing the last renewal of the execution, on the 5th June 1944, informed the sheriff, by letter, of the total credits allowed against the judgment from the proceeds of the sales.

After the sales the defendant demanded that the plaintiff remove the executions from the sheriff. Following the refusal or neglect of the plaintiff to do so, a motion in the action was made by the defendant for an order setting aside the execution. The defendant did not ask for a reference to take accounts, but the learned judge expressed the opinion that the application was sufficiently wide to enable him to make such an order.

The real question presented for the judgment of the Court is disclosed by the argument of counsel on behalf of the defendant, and is stated in various ways, *e.g.*, that the mortgage debt in this action is merged in the judgment, which by its terms imposes on the plaintiff the liability to reconvey on payment, and it therefore cannot enforce the judgment because of inability to comply with such terms; again, that the judgment in this action gave the defendant the right to a reconveyance of the mortgaged premises upon payment of the mortgage debt, and since the plaintiff can no longer reconvey the mortgaged premises, the Court will restrain it from any demand for payment on the judgment.

The plaintiff was entitled in law to enforce the judgment in its favour by issue of execution, and proceeded to exercise its right without any irregularity in proceedings or abuse of the process of the Court. Under such circumstances the Court has no inherent jurisdiction to restrain the plaintiff by an order made on application in the action after judgment, and no such jurisdiction has been given to the Court by statute or by any Rule of Practice. It is my opinion that the learned judge had no jurisdiction to entertain an application after judgment for an order to set aside the execution issued thereon: *Emerson et al. v. Fisher et al.*, [1944] O.W.N. 375, [1944] 2 D.L.R. 803. He had no jurisdiction on such a proceeding to determine the rights of the parties arising in consequence of the exercise by the plaintiff of the powers of sale contained in the mortgages

after a judgment in its favour against the defendant on the covenants for payment of the mortgage debts. I am of the opinion, too, that he had no jurisdiction in the circumstances to direct a reference to take accounts between the parties.

On the hearing of this appeal the real question in controversy, as above stated, was fully argued, but I refrain from expressing any opinion on it because of my view that the learned judge had no jurisdiction to entertain the application or make the order in appeal. For this reason only I think the application ought to have been dismissed with costs; the provision in the order of the Court below as to an accounting ought to be struck out, and otherwise the appeal ought to be dismissed with costs.

Appeal dismissed with costs, subject to a variation.

Solicitors for the plaintiff, respondent: Salter, Stapells, Sewell & Reilly, Toronto.

Solicitors for the defendant, appellant: Taylor & Joy, Toronto.

[URQUHART J.]

Re Colthart; Ex parte Trustee.

Bankruptcy—Available Assets—After-acquired Property—Earnings of Debtor after Bankruptcy—Order for Periodical Payments to Trustee—Whether Order Possible in Case of Hourly Wage-earner — The Bankruptcy Act, R.S.C. 1927, c. 11, s. 23.

The decision in *In re Tod; Clarkson v. Tod*, [1934] S.C.R. 230, is not limited to persons who are paid by salary, and there is nothing in The Bankruptcy Act, R.S.C. 1927, c. 11, or in any Canadian decision, to prevent the making of an order requiring a debtor who is earning wages at an hourly rate to pay to the trustee, for the benefit of creditors, the excess over his reasonable requirements for living according to his station in life. *Hamilton v. Caldwell* (1919), 88 L.J.P.C. 173, applied; *Re Rung* (1928), 62 O.L.R. 557, considered. There is nothing in the Canadian Act to correspond to s. 51(2) of the English Act (The Bankruptcy Act, 1914, c. 59), and accordingly such decisions as *Ex parte Benwell*; *In re Hutton* (1884), 14 Q.B.D. 301, and *In re Jones*; *Ex parte Lloyd*, [1891] 2 Q.B. 231, are inapplicable.

A MOTION by the trustee of a bankrupt, on behalf of some of the creditors, for an order requiring the debtor to make periodical payments to the trustee out of his earnings. The facts are fully stated in the reasons for judgment.

7th November 1944. The application was heard by URQUHART J., sitting as Judge in Bankruptcy, at Toronto.

F. K. Higginbottom, for the trustee, applicant.

B. Luxenberg, K.C., for the debtor, *contra*.

13th December 1944. URQUHART J.:—This is an application by the trustee on behalf of certain creditors, who joined together under s. 69 of The Bankruptcy Act, R.S.C. 1927, c. 11 (the trustee having declined to do so on behalf of the creditors generally), for an order directing the debtor to pay out of his earnings a certain sum in excess of necessary requirements for the benefit of the applicant creditors.

The debtor was in the building business in Windsor, Ontario, prior to the 28th day of April 1942 when he was adjudged a bankrupt. He alleges that his bankruptcy was the result of his underestimating two building contracts in which he was engaged at the time. Seeing that he could not continue, he asked his main creditors to accept a compromise to enable him to continue, but they refused.

He seeks to derive some merit from the fact of their refusal, and also from the fact that he had dealt with them for some years in large sums and that their present claims are small in comparison to the total of the business which they derived from him. I have been listening to this argument for several years. The debtor argues in the case of one creditor that as he has given it \$20,000 worth of business over a previous period of time and its claim is only \$2,000, it should forget about the claim and be generous. Nothing could be more fallacious than this species of reasoning.

It was a bad failure, and the trustee has very little in its hands to go on. In fact, recoveries will scarcely equal disbursements, if they will do that, which I doubt. The creditors therefore will get nothing unless I make the order applied for.

Most of the defence of the debtor in his affidavit consists of history and other irrelevant matters. As to the earnings and situation of the debtor, both sides are in virtual agreement.

The debtor is employed presently at the Canadian Bridge Company Limited in Walkerville, which is known to me to be an excellent concern, and one which is doing and is capable of doing a large business. So far as I can gather, he is a war worker doing physical labour and is being paid at the rate of \$1.09 an hour. His gross earnings for one year, up to 15th June 1944, were \$2,785.18, according to the company's letter. The letter adds:

"Since he is on an hourly rate and our operations have recently been curtailed, there is a possibility that the amount earned may be reduced for a similar period ahead."

I do not think I could take into account the suggestion contained in the last paragraph, as to my way of thinking there is no prospect of an immediate termination of the war in Europe, and it is more than likely that this company, which has always enjoyed a large share of such business as is going, will continue to be busy for a considerable time.

The debtor says that he is in bad health, but no independent evidence or doctor's certificate of such is given and I do not pay much attention to his statement in that regard. He seems to be able to satisfy his employers. He is fifty-two years of age, and supports only his wife, in an apartment for which he pays \$45 per month. This apartment is in an excellent district and is much beyond what a bankrupt debtor in Windsor and an ordinary labourer should indulge in. I know of plenty of houses in Windsor, quite suitable, which rent for considerably less. Rents in Windsor, owing to too early "freezing", did not rise much beyond those of the depression period, and I would assume that the apartment occupied by the debtor cannot be justified considering his station in life as an ordinary war worker and the fact that he has been a bankrupt for more than two years.

Little or nothing can be done now to remedy this situation, as the housing shortage in Windsor is known to me to be very acute. I only mention the matter because it indicates in the debtor a lack of appreciation of his condition and a lack of regard for his creditors. Such an attitude is shown throughout the material. For example, the creditors suggest that he told one or more of them that he had withdrawn \$300 from the business on the occasion of his son's wedding in Toledo recently, and that in 1941 he had used \$1,000 of the moneys of the business to pay off a mortgage owed by his wife on certain of her property. The debtor of course denies both that he did these things and that he told anyone that he did.

There is another thing that the debtor has been doing which is in my opinion wrong. The Canadian Bank of Commerce is a secured creditor. As security it holds a life insurance policy on the life of the debtor, and the debtor has been paying the premiums out of his earnings since his bankruptcy. These

premiums amount to \$278.52 a year, or about \$25 a month. If the bank is interested in its security, it should of course keep up the premiums and charge them against the capital when collected. Up to 1st July 1944, these payments made little difference to the creditors, because to the extent of \$278.52 the payments merely resulted in exemption from the payment of the compulsory savings portion of the income tax. Now, however, this money is available to the debtor personally, and it should go to his creditors and not to the bank. If he continues to pay to the bank it becomes now a mere voluntary act. Compulsory savings could not be attached, nor could orders in bankruptcy affect same.

Counsel for the debtor excuses the bank's payments on the ground that the husband desires to build up for his wife some interest in the insurance policy if he should die soon and there should be an excess over the bank's claim. A good deal in the material indicates that his wife may have private means. The earnings of the debtor during a yearly period were \$2,785.18 gross. These are subject to certain deductions, income tax, unemployment insurance, hospitalization and the like, which leave a net income during the period of \$2,227.70, or an equivalent of \$42.84 per week to provide for the living expenses of the debtor and his wife.

Counsel for the creditors suggests that he could well afford to pay the excess over \$30 per week, while on the other hand counsel for the debtor says that he could not pay more than \$10 per month, even if an order were made.

The main defence of the debtor is that the Court has no power to order and will not order a wage-earner, whose earnings are based on an hourly rate, to make periodical payments to his creditors. The point has not come up squarely in any of the Canadian cases.

The leading case in our courts is *In re Tod; Clarkson v. Tod*, [1934] S.C.R. 230, [1934] 2 D.L.R. 316, 15 C.B.R. 253. The precise point in question in that case was whether or not future or unearned salary passed to the trustee in bankruptcy by virtue of s. 23(a) of the Act, and if it passed whether or not it was competent in the Court to make an order directing the payment of a certain excess over a certain amount to the trustee until the claims of the creditors and the costs of the trustee were fully satisfied.

The Supreme Court of Canada, after an exhaustive analysis of the English cases (the wording of the English Act on this point, except for the additional section hereafter referred to, being to all intents and purposes the same as our Act), and some Canadian cases, came to the conclusion that it was competent for the Judge in Bankruptcy to make the order in question.

The result is that it is now clear that an order may be made in respect of salary. So instalments of salary as they accrue from time to time beyond that which is required for the debtor's reasonable maintenance vest in the trustee, and an order can be made for payment to the trustee of instalments of salary receivable in future beyond that amount. See *Hamilton v. Caldwell* (1919), 88 L.J.P.C. 173, a case in the House of Lords from Scotland, where there is no similar section to the one in the English Act hereafter mentioned. In that case Viscount Finlay says, at p. 175:

"In my opinion the appeal fails. If the right to the instalments as they fall due vests in the trustee under the Act, subject to the *beneficium competentiae*, it follows that he must be able to apply to prevent the diversion of the instalments to any other purpose. If, when such an instalment was about to fall due, there was any ground to suppose that there was danger of its diversion, the trustee could come to the Court to have its payment to him secured. These instalments fall under the head of *acquirenda*, and the title of the trustee rests upon section 98, sub-section 1, of the Act. The property in each instalment would vest in the trustee only if it fell due, and it would fall due only if the bankrupt continued to work for Beardmore & Co., Lim. The argument for the appellant was that nothing could be done by the Court with reference to such *acquirenda* until the trustee's title had accrued when each instalment of salary had been earned and was payable, and that the trustee should then follow the procedure laid down in section 98, sub-section 1, and get an order accordingly. This argument appears to me to overlook the fact that it must be open to the Court to take proceedings to prevent the right of the trustee to each instalment as it falls due being defeated by the bankrupt's receiving and spending the money himself, and that if there be no such power, there might be a most inconvenient and unseemly scramble between the trustee and the bankrupt as each instalment fell due. The trustee surely might take steps, as any one instalment was about

to fall due, for the purpose of preventing the bankrupt from defeating his title by receiving and spending it, and if he can do it with regard to each particular instalment, there is no principle of law to prevent him from obtaining a general order of this kind for the protection of his title to receive each instalment as it falls due. The multiplication of orders and accumulation of costs would be thus prevented. The Court has complete control of any such order, and can withdraw or modify it at any moment if justice so requires."

Viscount Cave, at p. 176, says: "The Act contains no general provision similar to section 51 of the English Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), enabling the Court to attach the salary or income of a bankrupt, and the decision of this House in *Hollinshead v. Hazleton*, [1916] 1 A.C. 428, is therefore not in point."

In its discussion in the *Tod* case, the Supreme Court of Canada does not seem to differ from the decision of the Court of Appeal in *Re Rung*, 62 O.L.R. 557, 10 C.B.R. 1, [1929] 1 D.L.R. 303, which decision the Court of Appeal followed in reversing Sedgewick J., whose judgment was restored, in the *Tod* case. Counsel for the trustee argued that that decision stands and applies to this case.

The headnote for that case in C.B.R. commences:

"The capacity of earning money in the future is not property which can vest in the trustee. There is a distinction between a salary that may be paid 'irrespective of the amount of work' and earnings by the exercise of personal skill . . . The Bankruptcy Act was not intended to expect a trustee to harass wage earning undischarged bankrupts for the benefit of creditors, except only in such cases where it was made clear that the wage-earner should be made to pay something to his creditors out of his earnings."

The application in that case was in respect of salary of a substantial amount—\$6,200 per year. In view of the *Tod* decision this case in itself is not helpful. It decided merely that an order could not be made in respect of a fairly substantial salary, and of course this has long gone by the board.

The above last-quoted expressions in the headnote arise from remarks of Fisher J. (as he then was) in his judgment at p. 9:

"Orders for payment out of future personal earnings of a bankrupt should be made sparingly, as there is always the danger

of depriving a wage-earner of the means of livelihood for himself and family, and an employer might not care to be bothered with Court orders issued from time to time, and discharge the employee. Circumstances might also arise, in cases where an order was made and a certain sum fixed by the Court, for the maintenance of the wage-earner and his family, that would, owing to sickness or other unforeseen reasons, necessitate applications to the Court from time to time to change the amount allowed for maintenance and these applications and orders would undoubtedly create confusion and annoyance to an employer.

"I doubt if The Bankruptcy Act was ever intended to expect a trustee to harass wage-earning undischarged bankrupts for the benefit of creditors, excepting only in such cases where it was made clear that the wage-earner should be made to pay something to his creditors out of his earnings."

These expressions are merely *obiter*, and represent only the opinion of one judge. The salary of an employee was what was under consideration in that case after all.

The next case in Ontario was *In re Riggs* (1938), 20 C.B.R. 117. The debtor was a high school teacher, unmarried, earning \$2,115 per year. I ordered him to pay \$20 per month to the trustee. This again was a case where the debtor was in receipt of a definite salary and was not a wage-earner. He was in receipt of money with respect to a particular period, such as a year or some part of a year, as mentioned in some English cases. No appeal was taken from my decision.

Two years later in *In re Bettoli* (1941), 22 C.B.R. 327, I decided in respect of another salaried man. This man made \$3,000 per year and supported a wife and three children. They were in bad health and doctors' bills were bothersome. I held that a clear case had not been made out, having in view the difficulties of the debtor and the times, and I refused to make the order. I left the matter open to be taken up again if the situation improved.

The next case decided by me is *In re Pettigrew and Plamondon* (1943), 24 C.B.R. 184. These men are described in the judgment as war workers, and so far as I remember were wage-earners. The point raised in the present case was not discussed at that hearing. In regard to Pettigrew, I ordered him to pay the amount of his compulsory savings when realized by him.

Later counsel was advised by the government that these could not be attached, and his case was re-opened.

In the case of Plamandon, his gross wages were \$1,983.61, and his net \$1,649.15, for 40 weeks. His rent was \$30 per month, and he was newly married. I found him able to pay his creditors \$30 per month. No appeal that I recall was taken from this order.

Unless the English cases are applicable and forbid it, there is no case in Canada that I know of which decides that a wage-earner's earnings cannot be ordered to be paid to creditors.

One English case referred to in both the *Tod* and *Rung* cases, is *Ex parte Benwell; In re Hutton* (1884), 14 Q.B.D. 301. The debtor in that case was a bone-setter earning a large amount each year from fees. His earnings were dependent on whether he was consulted or not, and upon whether he was available or not. It was held that his earnings were not subject to any order. The decision was based on the theory that earnings by the exercise of personal skill were not income within the meaning of the Act, in that "There is nothing in it of the nature of a pension or salary; there is an element of uncertainty in it": per Lindley L.J., at p. 309.

Another case is *In re Jones; Ex parte Lloyd*, [1891] 2 Q.B. 231. There it was held that the wages earned by a workman employed in a colliery were not part of the after-acquired property contemplated by the Act. Cave J. said at pp. 231-2:

"An interpretation has been placed on the expression 'salary or income other than as aforesaid' . . . where the Court of Appeal held that although the debtor was making large sums of money, amounting to more than £1000 a year, yet, inasmuch as he was not entitled to receive that money with respect to any particular period, such as a year or some part of a year, irrespective of the amount of work he did, the money so received was not 'income' ejusdem generis with 'salary', within the meaning of the Bankruptcy Act, and therefore an order could not be made to pay any part of his earnings to his trustee in bankruptcy, to be applied for the benefit of his creditors. I cannot distinguish the case of a working collier from that case, for there it was pointed out that it was impossible to compel the debtor to go on working and earning money, and in the same way, here, if the debtor does not choose to go to work he will earn nothing."

It must be remembered that the English Act, unlike the Scottish and our Act, contains an extra section which does not occur in our Act, and which, if the *ejusdem generis* rule is applied, cuts down the effect of the section corresponding to our s. 23. This extra section in the present English Act (1914, c. 59) is s. 51, of which subs. 2 reads in part as follows:—

“Where a bankrupt is in receipt of a salary or income other than aforesaid, . . . the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, . . . or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct.”

The result is that in my opinion the English cases as to wages are not applicable, and the principle in the *Tod* case extends to wage-earners as well as salaried employees. Were it not for Mr. Luxenberg's argument, I would never have given the point raised by him a thought, as I did not in the *Pettigrew* case. Indeed, the remarks of Fisher J. in the *Rung* case seem to indicate that where it is made clear that the wage-earner should be made to pay something to his creditors, the order may be made.

The debtor, though actually earning wages, is not a “wage-earner” as defined by the Act. Section 2(1) defines a wage-earner as “one who works for wages, salary, commission or hire at a rate of compensation not exceeding fifteen hundred dollars per year, and who does not on his own account carry on business.”

A “wage-earner” cannot be put into bankruptcy (see s. 7), but there is nothing in the Act which exempts him from any other part.

The usual order should go, but the question remains what amount should be paid by the debtor to his creditors.

The general rule in these cases is that the debtor is entitled to the fair and reasonable amount required for the maintenance of himself and his family according to their condition in life. As Lord Esher M.R. says in *In re Shine; Ex parte Shine*, [1892] 1 Q.B. 522, at p. 532: “ . . . I think the Court ought not to cut down the bankrupt's means of livelihood too closely, but ought to leave a liberal margin for his support.”

The present case approximates that of Plamandon above mentioned, except that Plamandon was more moderate in the amount he paid for rent, which was in my opinion more in keeping with his status as a war worker. Plamandon, being newly married, had also the prospect of a family. I ordered him to pay \$30 per month.

In the present case, in view of the rent which the debtor is paying, I can hardly make so great an order, but I am taking into account the saving on insurance premiums and all other circumstances set forth above and dealt with in the argument. I can see no reason why out of his earnings the debtor could not pay approximately \$25 per month to his creditors. Taking his net earnings at \$2,227.70, they are roughly \$185 per month. The order will therefore go that the debtor will pay to the trustee, for the creditors concerned, the excess over \$160 per month, and as he has expressed the wish to pay any amount ordered in half-monthly instalments, the order may provide for such; first payment to be made on next pay day (date to be ascertained and put in order). The order may follow the form used in the case of Plamandon. The application having been resisted, the debtor will pay the costs of the applicant hereof, fixed at \$30, which may be added to the debt of the creditors. When the debt of the creditors interested, together with the above costs and the costs and remuneration of the trustee, are satisfied, this order shall cease to have effect, as other creditors are not interested in the result.

Order accordingly.

Solicitors for the trustee: Harvie & Holland, Windsor.

Solicitors for the debtor: Spencer and Donaldson, Windsor.

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